

No. 13117

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
Eastern District of Washington,
Northern Division.

FILED

NOV 30 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HARVEY ERICKSON,
United States Attorney;

FRANK R. FREEMAN,
Assistant United States Attorney,
Federal Building,
Spokane, Washington;

WILLIAM V. KELLEY,
Old National Bank Building,
Spokane, Washington,
Attorneys for Appellant.

LIONEL E. WOLFF,
Old National Bank Building,
Spokane, Washington,
Attorney for Appellee.

In the District Court of the United States for
the Eastern District of Washington, Northern
Division

No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Plaintiffs for cause of action allege:

I.

That plaintiffs were at all times herein mentioned and are now husband and wife, residing within the jurisdiction of this court.

II.

That defendant United States of America acting by and through the Bureau of Reclamation, Department of the Interior, is the owner of a tract of land lying within the government townsite known as Coulee Dam in Okanogan County, State of Washington. Said tract is bounded on the north by Roosevelt Avenue, on the west by Columbine Avenue, on the south by Fifth Street, and on the east by Fir Avenue; and is occupied by a frame business building known as the "General Store Building" fronting on Roosevelt Avenue.

III.

That on January 28, 1949, and for many years prior thereto the defendant United States of America, acting by and through its Bureau of Reclamation, owned, controlled and maintained said General Store Building and the sidewalks immediately north of and adjoining said Building, which sidewalks were held out as public ways and were used as such, and said sidewalks were heavily traveled and provided ingress and egress to and from the places of business located in said Building.

IV.

That on and for some days prior to January 28, 1949, the premises and sidewalks herein mentioned were in the control of the employees of the Bureau of Reclamation of the United States of America and said employees while acting within the scope of their employment, negligently kept and maintained said premises and particularly the sidewalks giving entrance to the front of said Building, in a highly dangerous, unsafe and defective condition, rendering said sidewalks and the approaches, adits and exists to and from said Building extremely hazardous and unsafe for the use of persons rightfully using the same. That said negligence of the defendant in the operation, management and maintenance of said Building and sidewalks proximately causing the event and injuries hereinafter described consisted of the following:

(1) The roof, eaves, eaves troughs and front portion of said building over said sidewalks were

so constructed and maintained that large quantities of water, snow, ice and sleet were diverted from natural channels and were dropped, cast or thrown on said sidewalks affording entrance to said Building. Said ice, snow and sleet were permitted to accumulate and remain on said sidewalks for days at a time prior to and on the 28th day of January, 1949, rendering the surface of said sidewalks rough, irregular, rounded, uneven, slippery, dangerous and unsafe.

(2) That the defendant's employees failed to remove said snow and ice which had been allowed to accumulate on said sidewalks for several days prior to and including the 28th day of January, 1949, and failed to cover the same with any substance or to otherwise reduce the hazard to those rightfully using said sidewalks.

(3) That the defendant's employees knew or with the exercise of ordinary prudence and care should have known of the defective condition of said building and sidewalks, and that with the use of ordinary prudence and care could have and should have remedied said defects or otherwise made said sidewalks safe for those rightfully using the same.

V.

That on the 28th day of January, 1949, at about 11:26 o'clock a.m. plaintiff Thera Phillips, being then within the jurisdiction of this court, after having done business at the Coulee Dam Beauty Shop, in said building, was leaving said building and of necessity endeavored to walk upon said

sidewalks, stepped upon said rough, irregular, rounded, uneven and slippery surface of ice and snow, slipped and fell.

VI.

That plaintiff Thera Phillips was on January 28, 1949, of the age of 44 years, large, weighing over two hundred pounds, and as a direct and proximate result of the fall above described, so caused by said negligence, she sustained bruises and injuries to her head, a tri-malleolor fracture with a posterior dislocation of her right ankle with obvious deformity and considerable displacement of the fragments, and injuries and weakness of the right ankle, and from said fall she also suffered nervous shock, and strained and bruised ligaments, muscles, and tissues of her limbs and body. That immediately after said fall she lay upon said surface with clothing disarrayed, and her body in immediate contact with the ice and snow for some time before enough men were available to remove her. That a crowd gathered as she thus lay helpless and exposed upon the ice and snow unable to get up. The crowd continued to gather as she was carried into Coulee Dam Co-op Store, Inc., where she was placed upon the floor and lay for half an hour. That she suffered great embarrassment in her predicament, and severe pain and mental anguish. That she was required to secure hospital, medical and surgical treatment by orthopedic specialists. That she was given hypodermics, opiates, and spinal injections to assist her and to ease the pain and shock, and to enable said broken ankle to be X-rayed, reduced and placed

in a cast. She remained under opiates for some time thereafter and was confined to the hospital 15 days, then was confined to a special hospital bed at home in a cast for an additional 5 weeks. After a total of 7 weeks the second cast was removed, replaced and a cumbersome and heavy walking iron was attached. Said plaintiff had 4 different plaster casts applied to the ankle. It was 15 weeks from the date of injury until all casts and irons were finally removed, and thereafter until early August, 1949, it was necessary for her to use crutches in order to walk. The aid of a cane continues and will continue to be necessary.

Plaintiff at the time of said injury was Mother Adviser to the Order of Rainbow Girls; Vice Grand of Rebekah Lodge 315 Grand Coulee; active in Church and Guild activities; Membership Chairman of the League of Woman Voters at Coulee Dam; Vice President of Agnes Gehrman Chapter of the Order of Eastern Star; Program Chairman, musician, and on committees for the Women of Rotary; all of which civic and social activities she has had to curtail due to said injury. For many years prior to the 28th of January, 1949, plaintiff drove the family car, but as a result of the injury she has been unable to do so, all of which inconveniences the plaintiffs, adds to their expenses and curtails their pleasure, recreation and social activities.

That said plaintiff has from the time of said injury and will in the future suffer great mental and physical pain, embarrassment and varying degrees

of immobility. As a result plaintiff suffers permanent disability and impairment of the use of the right ankle. Plaintiff has been damaged as in Paragraph VIII set forth in the sum of \$25,000.00.

VII.

Further as a proximate result of the defendant's negligence plaintiffs were damaged in the following reasonable amounts:

(a) \$30.12 in that plaintiff Thera Phillips was unable to do the family laundry from the date of said injury until December, 1949, and plaintiffs were thereby required to make expenditures to have said laundry done.

(b) \$130.00 in that plaintiff's minor daughter, Thera Phillips, would have continued earning money as a theatre usherette at \$5.00 a week, but was required to terminate her employment to assist at home.

(c) \$19.95 in that plaintiffs were required to make long distance telephone calls relating to medical care and hospitalization.

(d) \$6.00 in that, as a necessary convenience to plaintiff Thera Phillips while confined to her bed, a telephone extension was installed.

(e) \$57.08 for drugs, medical supplies and a cane required by plaintiff Thera Phillips.

(f) \$48.69 in that plaintiff Thera Phillips was required to travel from her home at Coulee Dam to the City of Spokane for medical care and hospitalization on 9 different occasions at \$5.41 per round trip by bus.

(g) \$36.90 in that the clothing worn by plain-

tiff Thera Phillips at the time of the injury was damaged to that extent.

(h) \$34.44 in that plaintiff Thera Phillips was unable to wear her high heeled shoes after said injury and was required to replace them with lower heeled shoes.

(i) \$706.56 in that plaintiff Thera Phillips required hospitalization for a total of 19 days, and required the use of laboratories, operating rooms and hospital X-ray equipment, and required medical, surgical and therapeutic treatment as well as X-rays outside the hospital.

VIII.

Further Plaintiff Homer C. Phillips was completely deprived of Thera Phillips' companionship, wifely services and duties, and of all conjugal rights, and all other elements of consortium during the period of her hospitalization and confinement to her bed at home with casts and braces. Further, such rights now and ever since January 28, 1949, and in the future will be greatly impaired, all to his damage in the amount of \$5,000.00.

IX.

That it has been necessary for plaintiffs to employ the services of their attorneys herein named to prosecute this action, and out of any recovery the Court should award reasonable attorneys' fees, not exceeding 20% thereof, to be paid to said attorneys out of the judgment.

Wherefore, plaintiffs pray judgment against the

defendant United States of America in the amount of \$31,069.74; that out of said judgment reasonable compensation in the amount of 20% thereof be awarded plaintiffs' attorneys herein; for costs and disbursements in this action as by statute provided; and for such other and further relief as the Court may deem just and equitable.

LIONEL E. WOLFF and
STANLEY J. KRESHEL,

By /s/ LIONEL E. WOLFF,
Attorneys for Plaintiffs,

Duly verified.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and in answer to plaintiff's complaint alleges as follows:

I.

The allegations of paragraph I are admitted.

II.

The allegations of paragraph II are admitted.

III.

The allegations of paragraph III are admitted, with the exception that the defendant denies that it controlled and maintained the sidewalks adjoining said building.

IV.

The allegations of paragraph IV are denied.

V.

The allegations of paragraph V are denied, except that it is admitted that the plaintiff fell on the sidewalk, as alleged, on January 28, 1949.

VI.

It is admitted that the plaintiff fell on January 28, 1949, and sustained certain injuries, but it is denied that said injuries are of a permanent nature.

VII.

The allegations of paragraph VII are denied for the reason that this defendant does not have sufficient information to form a belief as to their accuracy.

VIII.

The allegations of paragraph VIII are denied.

IX.

It is admitted that, if damages should be recovered, reasonable attorneys' fees should be allowed.

First Affirmative Defense

I.

This defendant alleges that the injuries referred to in plaintiffs' complaint are wholly and entirely the result of an act of God and not from any negligence or carelessness on the part of the defendant, its servants, agents or employees, in that the winter of 1949 was the most severe one experienced at Coulee Dam since the construction of the building described in plaintiffs' complaint; that on or about January 28th there was an unprecedented accumulation of snow and ice from natural causes; that for several days prior to said date, snow fell during the day and froze at night.

Second Affirmative Defense

I.

Further answering said complaint, and as a second affirmative defense thereto, this defendant alleges that if plaintiff, Thera Phillips, sustained any injuries, or plaintiffs sustained any damages by reason of the matters and things set forth in plaintiffs' complaint, same were caused by plaintiff, Thera Phillips, proximately contributing thereto, in that at the time of the injuries alleged in plaintiffs' complaint, plaintiff, Thera Phillips, was, and for some time prior to her fall, had been fully acquainted with the unusual prevalent weather conditions in Coulee Dam and was aware of the condition of the sidewalk described in said complaint, and knew all about the condition relative to the snow and ice at the place thereon that the fall occurred, but nevertheless, hurried over said place and otherwise failed to exercise ordinary care and prudence for her own safety.

Wherefore, defendant prays that an order be entered, dismissing the complaint of plaintiffs with prejudice and without costs, and that plaintiffs take nothing thereby.

/s/ HARVEY ERICKSON,

United States Attorney.

WITHERSPOON,

WITHERSPOON & KELLEY,

Of Counsel.

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1951.

[Title of District Court and Cause.]

ORDER FOR PRE-TRIAL CONFERENCE
UNDER RULE 16

To Lionel E. Wolff, Attorney for Plaintiff, Old National Bank Bldg., Spokane, Washington; Harvey Erickson, U. S. Attorney, Federal Bldg., Spokane, Washington; William V. Kelley, Of Counsel for Defendant, Old National Bank Bldg., Spokane, Washington.

By virtue of Pre-Trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled court at Spokane, on Friday, March 30, 1951, at 1:30 p. m. to consider

- (1) The simplification of the issues.
- (2) The necessity or desirability of amendments to the pleadings.
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.
- (4) The limitation of expert witnesses.
- (5) Such other matters as may be of aid in the disposition of the action.

It is requested that counsel produce at the pre-trial conference all documents or physical objects which he intends to offer as evidence at the trial. Any document not so produced will not be admitted

at the trial unless good cause is shown why it was not produced at the pre-trial conference.

It is suggested that in order to obtain the best results in a pre-trial conference, counsel should have with him the party, in case of an individual, or some responsible officer or agent with authority to speak for the party, in the case of a corporation.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by mailing a copy hereof to their attorneys at the addresses disclosed by the record herein.

Dated this 13th day of March, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Copies served.

[Endorsed]: Filed March 13, 1951.

[Title of District Court and Cause.]

NOTICE OF EXAMINATION OF DOCUMENTS AND OF DEPOSITION UPON ORAL EXAMINATION

To the above named Defendant and to Harvey Erickson, Frank R. Freeman, Witherspoon, Witherspoon and Kelley, your Attorneys:

You, and Each of You, Will Please Take Notice that the undersigned will orally examine under oath the following named persons:

Mr. Alfred Darland, Coulee Dam, Washington,

Mr. C. E. Benjamin, City Engineer, Coulee Dam, Washington,

Mr. Phil Nalder, Assistant District Engineer, Bureau of Reclamation, Coulee Dam, Washington,

Mr. Torloff Torkelson, District Land Officer, Bureau of Reclamation, Coulee Dam, Washington,

before a court reporter and Notary Public of the State of Washington, at the office of Paul LeMargie, attorney for the Bureau of Reclamation, in the Administration Building, Coulee Dam, Washington, at the hour of 11:00 o'clock a. m. on the 26th day of October 1950, and such examination will be continued from time to time and from day to day until the same is fully taken and completed.

At the said time and place the undersigned will also inspect, copy, examine or photograph books, papers, agreements, leases, rules, regulations and documents containing all pertinent rights and duties relating to the maintenance and control of the building and sidewalks and relating to the tenancy, duties, rights and liabilities of persons in, about and around said sidewalks and premises known as the "General Store Building" at Coulee Dam, Washington, as described in the Complaint on file herein.

Dated this 20th day of October, 1950.

LIONEL E. WOLFF, and

STANLEY J. KRESHEL,

By /s/ STANLEY J. KRESHEL,
Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs and, by way of reply to defendant's answer and affirmative defenses, admit, allege and deny as follows:

I.

Deny the allegations of Paragraph I of defendant's first affirmative defense.

II.

Admit that Plaintiff Thera Phillips knew what the weather conditions were in Coulee Dam and was aware of the condition of the sidewalk, but specifically deny all of the other allegations, matters and things set forth in Paragraph I of the defendant's second affirmative defense.

Wherefore, Plaintiffs pray for the relief requested in their complaint on file herein.

LIONEL E. WOLFF, and

STANLEY J. KRESHEL,

By /s/ LIONEL E. WOLFF,

Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

ORDER ON PRETRIAL CONFERENCE

Pursuant to an order for pretrial conference under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 30th day of March, 1951. Lionel Wolff and S. J. Kreshel appearing as attorneys for the plaintiffs and Harvey Erickson, U. S. Attorney and William V. Kelley appearing as attorneys for the defendant.

It is stipulated that the plaintiffs have paid the amounts shown in the following identifications.

Plaintiff's Identification "1" Bills for drugs.

Plaintiff's Identification "2" Hospital Bills.

Plaintiff's Identification "3" Doctors' Bills.

Plaintiff's Identification "4" Bill for Physiotherapist.

Plaintiff's Identification "5" Anesthesiologist's Bill.

Plaintiff's Identification "6" Clothing Bills.

Plaintiff's Identification "11" Telephone bills (tolls).

Plaintiff's Identification "7" Draft of floor plan of building.

It is stipulated that Plaintiff's Identification "7" may be admitted without objection.

Plaintiff's Identification "8" to "8-h" Photos of building.

Plaintiff's Identification "9" Letter Nalder to Wolff 11/23/49.

Plaintiff's Identification "10" Letter Banks to Wolff 12/1/49.

Defendant admits the authenticity of Identifications 9 and 10 but reserves all other objections to their admissibility in evidence.

Plaintiff is granted the right to offer in evidence, the shoes and galoshes worn by the plaintiff at the time of the accident.

Defendant's Identification "12" Photo close-up of building.

Defendant's Identification "13" Photo of building and area.

Defendant's Identification "14" Weather reports.

Plaintiff stipulates that Defendant's Identification 13 may be admitted without objections and admits the authenticity of Identification 14 but reserves all other objections to its admissibility in evidence.

It is further stipulated that the photostatic copies of documents attached to the depositions of Messrs. Nalder, Torkelson and Benjamin, including daily work reports which were not marked by the notary, may be admitted without objection as to authenticity but defendant reserves all other objections to their admissibility in evidence.

Plaintiff's Motion to strike lines 7 and 8 of the second affirmative defense argued and denied.

Dated this 11th day of April, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came regularly on for trial before the undersigned Judge of the above entitled Court without a jury. Plaintiffs appeared in person and by their attorneys, Lionel E. Wolff and Stanley J. Kreshel. The defendant appeared through the District Attorney, Harvey Erickson, and Attorneys Witherspoon, Witherspoon & Kelley. All parties having announced themselves ready for trial, witnesses were sworn on behalf of all parties, testimony taken and documentary evidence introduced, and the Court having heretofore entered its Memo-

random Opinion and being fully advised in the premises, does make the following:

Findings of Fact

I.

That plaintiffs were at all times herein mentioned and are now husband and wife, residing within the jurisdiction of this court.

II.

That defendant United States of America, acting by and thru the Bureau of Reclamation, Department of the Interior, is the owner of a tract of land lying within the government townsite known as Coulee Dam in Okanogan County, State of Washington. Said tract is bounded on the north by Roosevelt Avenue, on the west by Columbine Avenue, on the south by Fifth Street, and on the east by Fir Avenue; and is occupied by a frame business building known as the "General Store Building" fronting on Roosevelt Avenue.

III.

That on January 28, 1949, and for many years prior thereto the defendant United States of America, acting by and through its Bureau of Reclamation, owned, controlled and maintained said General Store Building and the sidewalks immediately north of and adjoining said Building, which sidewalks were held out as public ways and were used as such, and said sidewalks were heavily traveled and provided ingress and egress to and from the places of business located in said building.

IV.

That on and for some days prior to January 28, 1949, the premises and sidewalks herein mentioned were in the control of the employees of the Bureau of Reclamation of the United States of America and said employees while acting within the scope of their employment, negligently kept and maintained said premises and particularly the sidewalks giving entrance to the front of said Building, in a highly dangerous, unsafe and defective condition, rendering said sidewalks and the approaches, adits and exits to and from said building extremely hazardous and unsafe for the use of persons rightfully using the same. That said negligence of the defendant in the operation, management and maintenance of said Building and sidewalks proximately causing the event and injuries hereinafter described consisted of the following:

(1) The roof, eaves, eaves troughs and front portion of said building over said sidewalks were so constructed and maintained that large quantities of water, snow, ice and sleet were diverted from natural channels and were dropped, cast or thrown on said sidewalks affording entrance to said building. Said ice, snow and sleet were permitted to accumulate and remain on said sidewalks for days at a time prior to and on the 28th day of January, 1949, rendering the surface of said sidewalks rough, irregular, rounded, uneven, slippery, dangerous and unsafe.

(2) That the defendant's employees failed to

remove said snow and ice which had been allowed to accumulate on said sidewalks for several days prior to and including the 28th day of January, 1949, and failed to cover the same with any substance or to otherwise reduce the hazard to those rightfully using said sidewalks.

(3) That the defendant's employees knew or with the exercise of ordinary prudence and care should have known of the defective condition of said building and sidewalks, and that with the use or ordinary prudence and care could have and should have remedied said defects or otherwise made said sidewalks safe for those rightfully using the same.

V.

That on the 28th day of January, 1949, at about 11:26 o'clock a. m. plaintiff Thera Phillips, being then within the jurisdiction of this court, after having done business at the Coulee Dam Beauty Shop, in said building, was leaving said Building and of necessity endeavored to walk upon said sidewalks, stepped upon said rough, irregular, rounded, uneven and slippery surface of ice and snow, slipped and fell. The point on the sidewalk at which she fell was in front of the doorway entrance to the second floor stairs, leading to the mezzanine floor occupied by said Coulee Dam Beauty Shop and defendant.

VI.

That plaintiff Thera Phillips was on January 28, 1949, of the age of 44 years, large, weighing over two hundred pounds, and as a direct and prox-

mate result of the fall above described, so caused by said negligence, she sustained bruises and injuries to her head, a tri-malleolus fracture with a posterior dislocation of her right ankle with obvious deformity and considerable displacement of the fragments, and injuries and weakness of the right ankle, and from said fall she also suffered nervous shock, and strained and bruised ligaments, muscles, and tissues of her limbs and body. That immediately after said fall she lay upon said surface with clothing disarrayed, and her body in immediate contact with the ice and snow for some time before enough men were available to remove her. That a crowd gathered as she thus lay helpless and exposed upon the ice and snow unable to get up. The crowd continued to gather as she was carried into Coulee Dam Co-op Store, Inc., where she was placed upon the floor and lay for half an hour. That she suffered great embarrassment in her predicament, and severe pain and mental anguish. That she was required to secure hospital, medical and surgical treatment by orthopedic specialists. That she was given hypodermics, opiates, and spinal injections to assist her and to ease the pain and shock, and to enable said broken ankle to be X-rayed, reduced and placed in a cast. She remained under opiates for some time thereafter and was confined to the hospital 15 days, then was confined to a special hospital bed at home in a cast for an additional 5 weeks. After a total of 7 weeks the second cast was removed, replaced and a cumbersome and heavy walking iron was attached. Said plaintiff

had 4 different plaster casts applied to the ankle. It was 15 weeks from the date of injury until all casts and irons were finally removed, and thereafter until early August, 1949, it was necessary for her to use crutches in order to walk. The aid of a cane continues and will continue to be necessary.

Plaintiff at the time of said injury was Mother Adviser to the Order of Rainbow Girls; Vice Grand of Rebekah Lodge 315 Grand Coulee; active in Church and Guild activities; Membership Chairman of the League of Women Voters at Coulee Dam; Vice President of Agnes Gehrman Chapter of the Order of Eastern Star; Program Chairman, musician, and on committees for the Women of Rotary; all of which civic and social activities she has had to curtail due to said injury. For many years prior to the 28th of January, 1949, plaintiff drove the family car, but as a result of the injury she has been unable to do so, all of which inconveniences the plaintiffs, adds to their expenses and curtails their pleasure, recreation and social activities.

That said plaintiff has from the time of said injury and will in the future suffer great mental and physical pain, embarrassment and varying degrees of immobility, by reason of which she has been damaged in the sum of \$1200.00.

VII.

That as a result of said injuries plaintiff suffers permanent disability and impairment of the use of

the right ankle, as a result of which plaintiff has been damaged in the sum of \$3000.00.

VIII.

Further as a proximate result of the defendant's negligence plaintiffs were damaged in the following reasonable amounts:

(a) \$30.12 in that plaintiff Thera Phillips was unable to do the family laundry from the date of said injury until December, 1949, and plaintiffs were thereby required to make expenditures to have said laundry done.

(b) \$130.00 in that plaintiffs' minor daughter, Thera Phillips, would have continued earning money as a theatre usherette at \$5.00 a week, but was required to terminate her employment to assist at home.

(c) \$19.95 in that plaintiffs were required to make long distance telephone calls relating to medical care and hospitalization.

(d) \$6.00 in that, as a necessary convenience to plaintiff Thera Phillips, while confined to her bed, a telephone extension was installed.

(e) \$57.08 for drugs, medical supplies and a cane required by plaintiff Thera Phillips.

(f) \$48.69 in that plaintiff Thera Phillips was required to travel from her home at Coulee Dam to the City of Spokane for medical care and hospitalization on 9 different occasions at \$5.41 per round trip by bus.

(g) \$36.90 in that the clothing worn by plaintiff Thera Phillips was damaged at the time of the injury to that extent.

(h) \$34.44 in that plaintiff Thera Phillips was unable to wear her high heeled shoes after said injury and was required to replace them with lower heeled shoes.

(i) \$706.56 in that plaintiff Thera Phillips required hospitalization for a total of 19 days, and required the use of laboratories, operating rooms and hospital X-ray equipment, and required medical, surgical and therapeutic treatment as well as x-rays outside the hospital.

IX.

Further Plaintiff Homer C. Phillips was completely deprived of Thera Phillips' companionship, wifely services and duties, and of all conjugal rights, and all other elements of consortium during the period of her hospitalization and confinement to her bed at home with casts and braces. Further, such rights now and ever since January 28, 1949, and in the future will be greatly impaired, all to his damage in the amount of \$1200.00.

X.

That it has been necessary for plaintiffs to employ the services of their attorneys herein named to prosecute this action, and out of any recovery the Court should award reasonable attorneys' fees, amounting to 20% thereof, to be paid to said attorneys out of the judgment.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. That plaintiffs are entitled to Judgment against the Defendant United States of America in the amount of \$6469.74.

2. That out of said Judgment reasonable compensation in the amount of 20% thereof be awarded and paid to plaintiffs' attorneys herein.

3. That plaintiffs are entitled to Judgment against the United States of America for their costs as taxed by the Clerk in the amount of \$432.02.

Done in open court this 8th day of May, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ LIONEL E. WOLFF,
For Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1951.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled cause having come on for trial before the undersigned Judge of the above-entitled Court on April 11, 1951, without a jury. Plaintiffs appeared in person and by their attorneys, Lionel E. Wolff and Stanley J. Kreshel. The defendant appeared through the District Attorney, Harvey Erickson, and Attorneys Witherspoon, Witherspoon & Kelley. All parties having announced themselves ready for trial, witnesses were sworn on behalf of all parties, testimony taken and documentary evidence introduced, and the Court having listened to the argument of counsel and being fully advised in the premises and having rendered its Memorandum Opinion, and the Court having entered its Findings of Fact and Conclusions of Law,

Now, Therefore, Judgment Is Hereby Entered:

1. Against the Defendant United States of America in the sum of \$6469.74.

2. That out of said Judgment, reasonable compensation in the amount of 20% thereof shall be awarded and paid to plaintiffs' attorneys herein.

3. Against the Defendant United States of America for plaintiffs' costs and disbursements as taxed by the Clerk in the amount of \$432.02.

Done in open Court this 8th day of May, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

LIONEL E. WOLFF.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, does hereby appeal to the Circuit Court of Appeals for the Ninth District from the final judgment entered in this action on the 8th day of May, 1951.

Dated this 5th day of July, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant United States At-
torney.

CC mailed to Lionel E. Wolff and Stanley J. Kreshel, Attorneys for the Plaintiffs, 7/5/51. ELC, Dep. Clk.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the defendant, United States of America, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, and pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure designates the entire record in the above-entitled case to be the record on appeal, as follows:

Complaint.

Summons.

Affidavit of Service by Mail.

Motion to Dismiss.

Motion to Quash.

Notice of Association.

Notice of Appearance.

Order Denying Defendant's Motion to Dismiss.

Motion for Physical Examination.

Objections to Motion for Physical Examination.

Order.

Answer.

Motion for a More Definite Statement.

Stipulation.

Order Requiring More Definite Statement.

Amended Answer.

Affidavit of Service by Mail.

Stipulation.

Notice of Taking Deposition Upon Written Interrogatories of Eugene D. Wiley, M.D.

Motion to Strike.

Order for Pre-Trial Conference under Rule 16.

Subpoena (Directed to Phil Nalder).

Subpoena (Directed to C. E. Benjamin).

Subpoena (Directed to Alfred Darland).

Subpoena (Directed to Torloff Torkelson).

Notice of Examination of Documents and of Deposition Upon Oral Examination.

Notice of Filing Deposition.

Reply.

Notice of Filing Documents and Depositions on Oral Examinations.

Order on Pretrial Conference.

Proposed Findings of Fact and Conclusions of Law.

Memorandum of Costs and Disbursements.
Findings of Fact and Conclusions of Law.
Judgment.

Deposition of Eugene D. Wiley, M.D.

Reporter's Transcript of all Testimony, all Exhibits.

Notice of Appeal.

Order Extending Time to File and Docket Record on Appeal.

Dated this 14th day of September, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant United States At-
torney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 14, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF ADDI-
TIONAL CONTENTS OF RECORD ON
APPEAL

Come now the plaintiffs by Lionel E. Wolff, their attorney, and pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure designate the following additional portions of the record, proceedings and evidence to be included in the record on appeal, to wit:

Subpoena (directed to Sgt. James W. Gee).

Subpoena (directed to Bessie Dumas).

Subpoena (directed to Dr. Willis E. Smick).

Return receipt card from the United States mails attached to the Summons showing service upon the Department of Justice, Washington 25, D. C.

Depositions of Thoralf Torkkelson, Chester E. Benjamin and Philip R. Nalder.

Letter from Attorney Lionel E. Wolff to Mr. Aram LaFramboise, Clerk of the United States District Court, dated April 3, 1951, regarding proposed order on pretrial procedure.

Dated this 21st day of September, 1951.

/s/ LIONEL E. WOLFF,
Attorney for Plaintiffs.

Copy received.

[Endorsed]: Filed Sept. 21, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
AND DOCKET RECORD ON APPEAL

This matter coming on before the Court on the oral petition of Frank R. Freeman, Assistant United States Attorney for the Eastern District of Washington, for the entry of an order extending the time to file and docket the record on appeal in the above-entitled cause, and it appearing to the Court that due cause exists for such extension, and the Court being fully advised in the premises, it is hereby

Ordered that the time for filing and docketing the record on appeal in the above-entitled cause be and it is hereby extended to and including 90 days from the date of filing of the notice of appeal.

Dated this 8th day of August, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

FRANK R. FREEMAN,
Asst. U. S. Atty.

[Endorsed]: Filed August 8, 1951.

United States District Court, Eastern District
of Washington, Northern Division

Civil No. 892

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Wednesday, April 11, 1951, at 10 o'clock a.m. before the Honorable Sam M. Driver, United States District Judge, the plaintiff's appearing by Lionel E. Wolff and Stanley Kreshel, attorneys at law of Spokane, Washington, the defendant appearing by Harvey Erickson, United States Attorney, of Spokane, Washington, and William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane, Washington, Whereupon, the following proceedings were had and done, to wit:

The Court: You gentlemen on both sides have seen the proposed order on pretrial conference the Clerk has prepared. There has been one paragraph added; there was a little uncertainty about the status of the documents included in the depositions taken. It was my understanding that while the defendant reserved the right to object to them on any

and all grounds, they didn't question their authenticity or require the plaintiff to bring witnesses to identify them. If that's correct, then, the order in its present form is I assume acceptable to both parties?

Mr. Erickson: Yes.

The Court: You haven't any objection to the form of the order, then?

Mr. Wolff: No objection, your Honor.

The Court: All right, it will be entered as drafted. All right, you may proceed, then.

Mr. Wolff: I'd like to make a short statement to the Court.

Plaintiffs' Opening Statement

Mr. Wolff: This is an action for personal injuries against the United States suffered by Mrs. Phillips and her husband Homer Phillips at Coulee Dam on the 28th of January, 1949. We will prove in this action that the townsite of Coulee Dam, upon which is located a general store building surrounded by a sidewalk, is owned by the United States; that the government not only owns but controls and maintains the building and [2*] the sidewalk; that under the Federal Tort Claims Act the government has the same liability as a private person; that private persons in this situation would be liable for negligence; that the government was negligent in failing to maintain the roof in a safe condition, also in failing to maintain the sidewalk in a safe condition, although it our position that regardless of the government's control or maintenance of

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

the sidewalk, that their failure to maintain or control the roof in a safe condition in itself having resulted in ice and snow on that sidewalk, regardless of who maintained and controlled it, the government would be liable, but we can prove both, and that as a result of this negligence to Mrs. Phillips she suffered from a dislocated and broken right ankle; that she went through considerable pain and suffering in connection with her injury and in her confinement thereafter; that she still has to walk with a cane; that she has permanent disability, and that her husband has suffered the loss of consortium.

That she was an active person and enjoyed life in the fullest, engaged in many activities, most of which are now curtailed; that she is a large woman, and therefore her pain and suffering and her injury has been more than it might have been for a person of smaller size; and then I want to say that at the time this action was started we were unable to determine from the doctors the full extent of her injuries, and therefore as good prudence would indicate we asked damages in [3] a rather substantial amount. We feel now that we know what those permanent injuries amount to, we know what she's been through, we know what her husband has lost, and we feel that the amount of damages we've asked in the complaint is more than she is entitled to in view of what we have learned since. We do feel, however, your Honor, that at a very minimum she is entitled under the three headings to substantial damages for pain and suffering; we feel that she will prove that she is entitled to at least \$3500.00,

and we feel that for the loss of consortium that her husband has suffered he is entitled to at least \$3500.00, and we feel that for her permanent disability she is entitled to at least \$3500.00.

Now, it is also our position that under the pleadings many matters have been disposed of, and it remains for us to prove in paragraph 2 of our complaint nothing, inasmuch as it's been admitted, 1 and 2. In paragraph 3, the defendants have admitted everything except that the Bureau controlled and maintained the sidewalks. Other matters have been admitted. Paragraph 4 has been denied, and it will be our obligation to prove the negligence alleged in paragraph 4 fully. In paragraph 5, as to the fall, it has been admitted that she fell, but we will be obligated to prove all of the other allegations surrounding the fall. As to paragraph 6, referring to the injuries, I take it from the pleading that the only denial is that there are permanent injuries, and that we need not prove [4] any of the allegations except that these injuries are permanent.

The Court: Which paragraph is that?

Mr. Wolff: Paragraph 6, showing how she suffered, what she went through, and the details of her social activities and how they have been curtailed. It's our position that the answer merely denies that the injuries are permanent, and the rest are admitted.

The Court: I should think, however, that it might be well for you to go into the matter of her injuries both as to their character and her experience in reference to them, in order to enable the

Court, if nothing else, to fix the amount of her damages in case the Court finds for the plaintiff. Whether it's been denied or not the Court would have to know the extent of seriousness of her injury and the amount of pain, and so on.

Mr. Wolff: We intend to show that. As to our paragraph 7, setting forth the amount of money that she has spent, the special damages, I believe that through the pretrial procedure the amounts have been agreed upon, and it is now our obligation to prove that it was necessary for her to expend these sums. They have denied the loss of consortium, and they have admitted the allegation as to an award of fees out of any judgment, so we will proceed to put on our evidence to substantiate that complaint.

The Court: Do you have any statement at this time, gentlemen? [5]

Mr. Kelley: May we reserve our statement?

The Court: Yes.

Mr. Wolff: Call Mr. Benjamin..

CHESTER E. BENJAMIN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Chester E. Benjamin.

Q. Where do you live?

(Testimony of Chester E. Benjamin.)

A. Coulee Dam, 206 Columbia Street, Coulee Dam, Washington.

Q. What's your occupation?

A. I'm an engineer, and my present assignment is city engineer of the town of Coulee Dam.

Q. You work for the Bureau of Reclamation?

A. Yes.

Q. Calling your attention to the 28th of January, 1949, was your employment the same at that time?

A. Yes.

Q. How long had you been in that job?

A. I believe about nine years now. I'd have to check the dates. I think about nine years.

Q. As of now it's been about nine years. Are you a graduate engineer, Mr. Benjamin?

A. No, sir. [6]

Q. Your occupation is that of city engineer?

A. Yes.

Q. Was there a city manager at Coulee Dam in January, of 1949?

A. Yes.

Q. Was his name Mr. Garen?

A. Yes.

Q. And you were the assistant also to Mr. Garen?

A. During his absence I acted as his assistant, yes.

Mr. Kelley: I can't hear you.

A. During his absence I acted for him, and I am his assistant when he is present.

Mr. Wolff: We want the record to show that we are calling Mr. Benjamin as an adverse witness.

The Court: All right.

Q. (By Mr. Wolff): Now, in your work there

(Testimony of Chester E. Benjamin.)

at the Dam, Mr. Benjamin, was it not your responsibility to look after the maintenance and operation of structures owned by the United States in the town?

A. There are some exceptions to that. I do not have any responsibility for the power houses and dams and the appurtenant construction.

Q. And you also acted as building inspector at that time, January, 1949? A. Yes.

Q. You were employed in what was known as the municipal office? [7] A. Yes.

Q. Calling your attention to the building known as the General Store Building in Coulee Dam, I want to show you a photograph—may I have those pictures?

Questions by the Court:

Q. The city manager you mentioned, I presume, was with the Bureau of Reclamation?

A. Yes, sir.

Q. Was his position known as city manager?

A. Yes.

Q. This Coulee Dam, is that what used to be known as the Engineers' Town or Engineers' City there?

A. It includes that, and the old contractor's town of Mason City.

Q. Oh, it's on both sides of the river below the Dam? A. Yes, sir.

Q. Part of it is in Okanogan County and part of it in Grant, or is it Douglas? A. Both.

(Testimony of Chester E. Benjamin.)

Q. I see, three counties?

A. Yes, they come together.

Q. I don't remember just how the river bends around; the old Mason City was in Okanogan County?

A. Yes, that's the east side.

Q. And the other side is Grant and [8] Douglas?

A. Yes, sir; a very small part in Grant.

Further Direct Examination

By Mr. Wolff:

Q. These have been identified, I believe, and I want to show you, Mr. Benjamin, a document that we refer to as Defendant's Exhibit number 13, and ask you if you recognize that photograph?

A. Yes, I do.

Q. Can you state whether or not it shows the structure known as the general store building at Coulee Dam?

A. It shows most of it; this is it.

Q. Specifically, you're pointing to the building shown on the left hand side of the picture?

A. Yes.

Mr. Wolff: Now, let's see, this was previously identified, and I move its introduction in evidence.

The Court: Is there anything to indicate when that was taken? Perhaps you might be able to agree to that. The important thing is that the Court know whether that's taken at the time or near the time of the accident, or since.

Mr. Wolff: The purpose at the moment in intro-

(Testimony of Chester E. Benjamin.)

ducing it, your Honor, is merely to set the scene and show the building, and of course it's—

The Court: Well, that's what I thought; it isn't intended to show the condition at the time of the accident? [9]

Mr. Wolff: That's not our purpose in introducing it now.

The Court: All right; any objection?

Mr. Kelley: No, your Honor. It doesn't have any date on it.

The Court: It may be admitted, then.

Mr. Kelley: I just make the inquiry of Court and counsel, do you suppose we could put these exhibits in in order?

Mr. Wolff: In accordance with the number already on them?

Mr. Kelley: Yes.

Mr. Wolff: It would be difficult to do that, Mr. Kelley. Number 1 starts with the bills Mrs. Phillips paid.

The Court: I think we should keep the same numbers as in the pretrial conference.

Mr. Wolff: We will refer to this, then, as Defendant's Exhibit 13?

The Court: Yes, it's been our custom to call them identifications until they're admitted.

The Clerk: Shall I now mark it Plaintiff's Exhibit 13? It was a defendant's identification in the pretrial, but it's now offered by the plaintiff. I could carry the same number.

(Testimony of Chester E. Benjamin.)

The Court: Yes, I think you'd better just call it [10] plaintiff's then.

(Whereupon, the Defendant's Identification No. 13 was admitted in evidence as Plaintiff's Exhibit No. 13.)

The Court: Now, where is that building; is that in the old Mason City, or the old Engineers' Town?

A. It's in the old Mason City, your Honor.

The Court: Yes, across the river.

Q. (By Mr. Wolff): Now, Mr. Benjamin, I want to show you this document, it's marked plaintiff's identification number 7, and ask you if that is not the floor plan of the building shown in the last photograph?

A. It is intended to be the building. It may not be correct in all interior details, but it is the general store building.

Mr. Wolff: We move the introduction in evidence of this document.

The Court: It will be admitted. It's provided in the pretrial order that it may be admitted.

(Whereupon, Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Q. (By Mr. Wolff): Now, Mr. Benjamin, I want to show you this paper that's marked defendant's identification number 12, and ask you if that is not a photograph showing the north side of the general store building? [11]

A. It is.

Mr. Wolff: We move the introduction in evi-

(Testimony of Chester E. Benjamin.)

dence of this document referred to as defendant's identification 12.

The Court: Any objection to 12?

Mr. Kelley: No objection.

The Court: It will be admitted.

(Whereupon, the defendant's identification number 12 was admitted in evidence as Plaintiff's Exhibit No. 12.)

Mr. Kelley: That was the north side, I think you said? A. Yes, sir.

The Court: I was just trying to get oriented here on the floor plan of the building. Where would this number 12 be? You say that's the north side of the building; would that be up here on Roosevelt Avenue? A. Yes, that's correct.

Q. (By Mr. Wolff): Is this gray strip running along the building in front of the automobiles a sidewalk, Mr. Benjamin?

A. Yes. You're not speaking of the dark shadow? That's the curb.

Q. Yes, but there is a sidewalk adjoining the building on the north side, along Roosevelt Avenue?

A. Yes.

Q. And while the view is obscured by the automobiles in this [12] picture, the sidewalk does extend the full length of the building, does it not?

A. On this side?

Q. On the north side of the building.

A. Yes.

Q. And you will note in this photograph an open

(Testimony of Chester E. Benjamin.)

doorway, the only open doorway in the photograph?

A. May I correct you?

Q. Yes.

A. The doors are recessed at that point, you see, the doors are in a little more. They're not open.

Q. All right. You're referring to the dominant doorway near the center of the photograph?

A. Yes.

Q. And does the sidewalk extend in front of that doorway? A. Yes, it does.

The Court: Is that the doorway that's marked on here, the new entrance to the mezzanine floor and stairs? A. Yes, your Honor.

Q. And do you know where that doorway leads?

A. Yes, I do.

Q. Tell us.

A. It runs up twelve or fourteen steps and turns right and leads onto the mezzanine floor.

Q. So it leads to the mezzanine floor store [13] rooms? A. It does.

Mr. Kelley: Will your Honor pardon the interruption? In connection with your Honor's question, your Honor was referring to exhibit 7, for the record?

The Court: Yes.

A. They're not store rooms; they're offices and other rooms. There are rooms up there.

Q. Now, let's take plaintiff's exhibit 7 along with plaintiff's exhibit 12, and wouldn't it be correct to turn this this way?

A. It wouldn't for me; it might be for you.

(Testimony of Chester E. Benjamin.)

Q. But to match up with the photograph?

A. To match the photograph, yes, sir.

Q. And I want to ask you about this doorway; just inside the doorway is there any—does that doorway lead to anybody's place of business on the main floor?

A. Not on the main floor. It leads to a place of business on the mezzanine floor.

Q. And is there a large hall on the mezzanine floor?

A. There's quite a large open space, yes, sir.

Q. Well, I don't mean a runner hall, but a meeting hall, on the second floor?

A. It is used sometimes for the purpose, but it is not a meeting hall.

Q. An assembly room, or some such thing? [14]

A. It's been used for that. It's not really an assembly room.

Q. Well, the administration permits its use for that purpose? A. Occasionally.

Q. Yes. Does this doorway that we just referred to lead to some storage space on the main floor?

A. No, sir, not on the main floor.

Q. All right.

A. That's an enclosed stairway that leads to the mezzanine floor only.

Q. It leads no place except upstairs?

A. That's correct.

Mr. Kelley: Pardon the interruption; just for the record I wonder if he could designate this entrance or doorway he's talking about?

(Testimony of Chester E. Benjamin.)

The Court: Yes, I think there should be some indication on the floor plan.

A. It's the one described here.

Q. (By Mr. Wolff): Take the pencil, if you will, Mr. Benjamin, and mark with a symbol—let's write the word doorway just where the doorway exists on exhibit 7. That's fine. You don't need to write the word exhibit 7; it's on there. It appears to be, then, a double door there, Mr. Benjamin, is that right?

A. That's correct.

Q. Now, will you mark the same on the photograph? Just write [15] the words "doorway to mezzanine." All right; now, to have these both the same, let's have this one on exhibit 7 say "doorway to mezzanine." That's fine.

A. That's already marked on there, I'd like to call your attention to that, the plan is already marked "doorway to mezzanine."

The Court: Yes, it's already described.

Q. Mr. Benjamin, the roof of this building is not insulated, is it?

A. No, it is not.

Q. And do you know how much the overhang of the edges are over the doorway? About 30 inches?

A. Well, it's about 26 inches to the gutter and perhaps 32 over the gutter.

The Court: What did you say the overhang was?

A. 26 to the gutter and about 32 over the gutter. I've never measured it, however.

The Court: I'm not sure that I understood your

(Testimony of Chester E. Benjamin.)

previous question and answer as to whether the roof was insulated.

Mr. Wolff: That was the question, your Honor.

The Court: I don't know that I understand it; do you mean insulated underneath against cold or heat or what?

A. That's the way I understood it. [16]

Q. That's the way I meant. In other words, there is no insulating material under the surface of the roof——

A. None of any kind.

Q. ——to prevent heat loss.

The Court: I see. All right.

Q. Now, about that mezzanine, the United States Geological Survey maintain an office up there, do they not?

A. No, the United States National Park Service.

Q. The Park Service, that's right; and some other governmental agencies up there?

A. No other.

Q. The Indian Service? A. No.

Q. No other government agencies; speaking of January 28, 1949, that is?

A. Ever; then or any other time.

Q. All right.

A. With one slight exception. There was a brief time when the National Park Service permitted the United States Geological, or Coast and Geodetic, to occupy a portion thereof. It was for a brief period.

Q. Wasn't that in January of 1949?

A. I couldn't tell you, sir; I don't know. It's

(Testimony of Chester E. Benjamin.)

been some time past, when the surveys were made on Lake Roosevelt.

Q. And the government permitted use of this assembly hall to [17] various lodges from time to time, and organizations?

A. Organizations of some kind, yes.

Q. And that was true in January, 1949?

A. Yes.

Q. And calling your attention again to that same date, January 28, 1949, there were icicles on this building over the point where the entrance goes upstairs, were there not? A. I don't know.

Q. You don't know? A. No.

Q. May I have the deposition? Mr. Benjamin, do you recall that we took your deposition at Coulee Dam, in October of 1950? A. I remember it.

Q. I'll call your attention to the following questions that were asked you at that time: "Are there any records——

Mr. Kelley: Pardon the interruption; what page, Mr. Wolff?

Q. Page 47, Mr. Kelley. The question: "Are there any records showing whether or not there was an accumulation of icicles on the gutter of that building over the point on the sidewalk where there is an entrance that goes upstairs?" Do you recall my asking that question at that time? [18]

A. Yes.

Q. And do you recall your answer, "I don't believe there is any record of those"? You recall that you gave that answer? A. I think so.

(Testimony of Chester E. Benjamin.)

Q. And then the next question, Mr. Benjamin, that we asked was, "Do you know whether there were any icicles there on the 28th of January, 1949?" Do you recall our asking that question?

A. I think so.

Q. And the answer you gave, "I believe there were"?

Mr. Kelley: Well, finish the answer.

Q. Just a moment. Do you recall your answering that?

Mr. Kelley: If your Honor pleases, that isn't the proper way to interrogate the witness; if he's directing his attention to question and answer he should read all the answer.

The Court: Yes, I think so.

Mr. Wolff: You can read the rest of the answer, but I think since it was in sentences we may remind him of it sentence by sentence.

The Court: Yes, you may do that.

Q. Do you recall that answer? A. I do.

Q. You then went on and said "That question is too broad to answer by yes or no"; you also stated that? [19] A. That's correct.

Q. But you did say you thought that there were icicles there at that time?

A. Yes, but I had the advantage at that time of having my reports before me, and I don't have that advantage at the moment.

Q. You don't now have your reports before you?

A. They're in here.

Q. But you did say when you had your reports

(Testimony of Chester E. Benjamin.)

before you that you thought there were icicles there?

A. That's correct.

Q. Now, Mr. Benjamin, you know that the Bureau knocked the icicles off that point of the roof and the entire roof, and removed them frequently, when necessary?

Mr. Kelley: If your Honor pleases, may I respectfully ask counsel to designate for the record what he means by "that point," and also that the question embodies several questions.

The Court: Read the question.

(Pending question read by the reporter.)

Mr. Wolff: I can identify the point.

The Court: All right.

Mr. Wolff: And I might say that all the questions that will follow will refer to the point on the roof directly over the stairway entrance to the mezzanine. Now, [20] do you understand the question, Mr. Benjamin? A. Ask it again, please.

Mr. Wolff: Would you read the question again?

(Pending question again read by the reporter.)

A. Yes.

Q. And it is a fact, Mr. Benjamin, that icicles form there rapidly?

A. Yes, under certain conditions they do.

Q. And it is also a fact that the repair of gutters and eaves on that building, structurally, is the responsibility of the United States?

(Testimony of Chester E. Benjamin.)

Mr. Kelley: Well, just a moment; if your Honor pleases, that calls for a conclusion of the witness, and takes in quite a territory. He can ask what the facts were.

The Court: I think it does call for a conclusion. You can ask who built it and who maintains it and so on. Read the question again. This lawsuit promises to become very technical. After all, it's before the Court, and we're trying to get the facts out, and I don't think we should quibble about words and fine points too much; we'll be here until next month. Read the question.

(Pending question read by the reporter.)

Mr. Wolff: Counsel will have an opportunity to cross-examine, of course. [21]

The Court: Well, the question isn't too clear to me what you mean by responsibility.

The Witness: Nor to me, either.

The Court: I think you might split that up and ask him more in detail about the factual basis for responsibility. I'll sustain the objection to the question in that form.

Q. (By Mr. Wolff): You indicated previously, Mr. Benjamin, that your office has the responsibility of maintenance and operation of structures owned by the United States, with certain named exceptions?

Mr. Kelley: I apologize, your Honor; I feel I should interpose the same objection.

The Court: I'll overrule the objection.

(Testimony of Chester E. Benjamin.)

Q. (By Mr. Wolff): You so indicated, Mr. Benjamin? You recall that? A. Yes.

Q. Now, to follow along on that point, isn't it a fact that the government had the responsibility of repairing specifically the gutters and eaves on this building?

A. Well, I'm not here to determine the United States' responsibility, but the Bureau of Reclamation does repair that roof and gutters.

Q. And those gutters and that roof were repaired this past winter by the Bureau? [22]

Mr. Kelley: Just a moment; this past winter? Subsequent to the accident?

Mr. Wolff: We are now in April of 1951, and that would be the winter that would be called the 1950-51 winter.

Mr. Kelley: Yes, subsequent to the time of the accident; I would think it would be clearly inadmissible, your Honor.

Mr. Wolff: Well, it shows the maintenance and control. We're going into the question of before and after and during that period. He indicated during the period, and now we're asking after the period, and next I intend to ask before the specific date, to show the entire picture of maintenance and control before, at, and after.

The Court: Is there any question about who maintained and repaired this roof? Did anybody ever do anything about it except the Bureau?

The Witness: No, your Honor.

(Testimony of Chester E. Benjamin.)

The Court: Why spend all this time? Are you contesting the fact?

Mr. Kelley: I'm certainly objecting on the specific ground——

The Court: I think I have a right to ask you whether you admit it or deny it.

Mr. Kelley: I don't know, your Honor.

The Court: I should think you would, if you're in [23] this lawsuit as counsel. Don't you know whether the Bureau maintained and repaired that building?

Mr. Kelley: I do not, your Honor.

The Court: All right, go ahead.

Mr. Wolff: Kindly read the last question.

The Court: I'll tell you this; this witness has said nobody else repaired that building; the Court is going to assume his testimony is that the Bureau maintained and repaired this building before and after and at the time of this accident; is that correct?

The Witness: The roof, sir.

The Court: All right, go ahead with something else.

Q. (By Mr. Wolff): That includes the gutters and eaves? A. Yes.

Q. All right. As building inspector did you have occasion to inspect the roof and gutters and eaves over this doorway in January of 1949?

A. Yes.

Q. And as a matter of fact you did make a daily inspection there at that time?

(Testimony of Chester E. Benjamin.)

A. I think I saw it nearly every day, yes.

Q. And you observed shortly before the 28th of January, Mr. Benjamin, that ice forms readily on the eaves of that building?

A. I think that was true during the entire month of January. [24]

Q. Yes, and that it reaches the stage that it's dangerous, and when it does reach that stage you have it removed? A. Yes.

Q. Now, the government cleaned the sidewalks adjacent to the north side of the building, did it not, in January, 1949, Mr. Benjamin?

A. I think that's correct. I would have to check the records.

Q. And do you know, Mr. Benjamin, what the condition of ice or snow was in front of this mezzanine doorway on January 28, 1949?

A. No, I don't know, that date.

Q. Do you know whether or not the sidewalk in front of that door is level, Mr. Benjamin?

A. I know that it is not level.

Q. Do you know what the slant is? Can you express it in degrees?

A. I believe that—this is just a guess, now—it's about——

Q. Based upon your——

A. It's about 6 per cent along the building, and perhaps 2 or 3 inches from the building to the gutter.

Q. It slopes to the west, down to the west?

A. The sidewalk runs to the west and pitches to

(Testimony of Chester E. Benjamin.)

the gutter to the north. There is a slight variation in that grade in front of the entrances, to level up for the doors.

Q. But that's about right for that point in front of the door? [25] A. Approximately.

Mr. Wolff: That's all of the questions. You may inquire.

Mr. Kelley: We're not permitted when he's called as an adverse witness to cross, but if it will save time——

The Court: I think so, at least that's been my view of it, as to the matters that have been gone into on direct, of course, limited to that.

Mr. Wolff: Before cross-examination perhaps we should introduce in evidence the labor reports that have already been identified, I believe, and which relate to this same subject matter, to make the record complete and clear. Since they have been identified I move the introduction in evidence of all of the exhibits attached to the deposition on file herein—how do you refer to this?

The Clerk: Well, I'll take those off.

Mr. Wolff: In addition to the daily labor reports there is a lease that should be part of that.

The Clerk: The lease is here.

Mr. Wolff: And that also has been identified, and I move its introduction in evidence. It's referred to as "Pltfs. Id. No. 1, C.R.S. Notary." You're familiar with those documents, counsel, you have a copy.

(Testimony of Chester E. Benjamin.)

The Court: How many of those documents are there?

The Clerk: As I recall it I think there's only two [26] or three separate documents. Just a minute, now. The lease was marked as exhibit 1 to the deposition. That hasn't been marked in the pretrial at all, and then there are a number of documents that start with—that are marked to the deposition as 10-A through 10-O. It would be my purpose to mark them here, if I may, to mark them now.

The Court: Can't you give them numbers beginning with 15?

The Clerk: Yes, I'll mark the lease as plaintiff's 15.

(Whereupon, copy of lease 6/23/47 was marked Plaintiff's Exhibit No. 15 for identification.)

The Court: I wonder, since counsel for the defense is familiar with them, if we shouldn't take them up one at a time. The difficulty, as I see it, your deposition is not in evidence, and if there's any objection to these, there would have to be some testimony by the witness, I should think, to enable the Court to pass upon the objection.

Mr. Wolff: Your Honor, it's my recollection from the pretrial order that all of those were identified by stipulation; the only question would be their admissibility.

The Court: Well, as I understand, the pretrial order [27] provides merely that the defense will not

(Testimony of Chester E. Benjamin.)

raise any question as to their authenticity, that they are what they purport to be, but if an objection is made I don't know whether I could pass on it or not without having some testimony as to what the document is.

Mr. Wolff: The materiality?

The Court: Yes.

Mr. Wolff: Well, I offer them in evidence. I think they speak for themselves. If there's an objection we will attempt to meet it.

The Court: Well, I'll look at them and see if there's objection. Have you examined them, Mr. Kelley?

Mr. Kelley: Yes, I have examined it.

Mr. Erickson: I have examined it. No objection.

The Court: No objection to the lease; that's plaintiff's exhibit 15.

(Whereupon, Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

The Clerk: Now, the next series that are marked would be identification 16, which were marked by the reporter in the deposition as 10-A to 10-O. I'm marking all of them as one identification, Plaintiff's 16.

(Whereupon, work requests were marked Plaintiff's Exhibit No. 16 for identification.)

The Court: What are they? What do they appear to [28] be? Of course you can't testify to them.

(Testimony of Chester E. Benjamin.)

Mr. Wolff: Aren't they labeled as work labor reports and orders?

The Clerk: These are work requests——

The Court: First I'll find out if there's an objection to them.

Mr. Kelley: There's no objection to the authenticity, your Honor. If they are offered for the purpose of showing the Bureau's removal of snow and ice on or about January 28, 1949, from the sidewalk at the point previously identified in both the exhibits 12 and 7, there is an objection as to their competency, on the grounds that the exhibits don't substantiate such a claim. We haven't any testimony other than what Mr. Benjamin has given.

The Court: Well, if there's any objection at all to this series I think, Mr. Wolff, you should go into the matter of what these reports are and where they came from and what they show. It isn't clear to me from the documents themselves just what they are.

Mr. Wolff: We'll do that. Where are the others?

The Clerk: I'm marking them now.

The Court: What are you marking now?

The Clerk: Documents entitled "Daily Labor Report" purported to be dated from January 3, 1949, through January 28, 1949. I'm marking it as plaintiff's identification 17. [29]

(Whereupon, sheaf of Daily Labor Reports was marked Plaintiff's Exhibit No. 17 for identification.)

(Testimony of Chester E. Benjamin.)

Mr. Wolff: These are offered as a part of the same bundle that I originally spoke of; they were a part of the deposition.

The Clerk: Yes, they were with the deposition.

Mr. Wolff: If we may, then, set the objectionable material aside for the moment, and proceed with those that were a part of the deposition——

The Clerk: These were all a part of the deposition.

The Court: Now, if you'll show counsel the one you have marked 17, and see if there's any objection to that.

Mr. Kelley: May I ask, is what is now marked plaintiff's 17 the same as formerly exhibits 11-A and B to the deposition?

The Clerk: Yes, those two documents marked to the deposition 11-A and B are the last two pages of that one that you have in your hand. You will recall that there were a number of documents in the deposition envelope that had not been marked by the notary, and those are all of them, including what he had marked as 11-A and B.

Mr. Kelley: Merely for the record, there's no jury and I won't labor it, I make the same objection, and if [30] this plaintiff's 17 is the same as what was hitherto exhibits 11-A and B on the deposition, we object on the specific grounds that they don't substantiate the claim of removal of snow and ice on or about January 28, 1949, from the sidewalk by the Bureau, or from the eaves, and if it will aid your Honor any, the reason for that on a

(Testimony of Chester E. Benjamin.)

previous examination was that they only refer to removing icicles from Co-Op Store, with no designation where on this building it occurred; merely for the record.

Mr. Wolff: I think an examination of these by the Court will show that they do substantiate right on their face——

The Court: Well, if there's some dispute as to what the records show, that wouldn't prohibit my admitting them for what they may be worth. I think, though, you're taking a chance, while you have this witness here, if this can be cleared up so that I might be better able to pass on the dispute as to what the documents show, you should bring it out at this time. Of course you know that better than I do.

Mr. Wolff: That's a good suggestion.

Further Direct Examination

By Mr. Wolff:

Q. Mr. Benjamin, I want to show you plaintiff's identification 17, and start with the daily labor report dated January 28, 1949, of which there appear to be two pages, and specifically [31] that page that has written on it the writing "Plaintiff's Exhibit No. 11-A, C. R. Shuff, Notary," and calling your attention to the writing "Plowing snow off sidewalks," can you state—first of all, calling your attention to this document and the writing on it, this is a report relating to your office, is it not?

A. Yes.

(Testimony of Chester E. Benjamin.)

Q. And can you state where the snow was plowed off the sidewalk as referred to there? Do you know of your own knowledge?

A. It might be necessary for me to make a little detailed explanation there.

Q. Go ahead.

A. This plowing is done with a power machine, a small tractor similar to a garden tractor, and the principal thoroughfares, sidewalks, are plowed at one time. The man generally starts in the morning at the beginning of town and goes through the town plowing out the main thoroughfares where it's necessary to get people to work if the snow is drifted or if it is deep. I'm not certain that the plow is ever used on that sidewalk, but using the word "plowing" indicates the men used the machine.

Q. And plowed throughout the town?

A. Yes, but does not mean he necessarily plowed that sidewalk.

Q. But it could mean that? [32]

A. I am not aware that he ever used that machine on that sidewalk. It is somewhat hazardous to use it around many pedestrians.

Q. As indicated, the men spent many hours that day in that task, specifically 23 hours, isn't that correct?

A. About 21 hours, I would say.

Q. And the foreman 2 hours more?

A. And the foreman supervising the crew, yes.

Q. And generally this plowing is all around the town, and you don't remember from your own

(Testimony of Chester E. Benjamin.)

knowledge whether it covered this specific walk or not?

A. I couldn't remember that, sir.

Q. Do you have any other records that would indicate whether it did cover this walk or not?

A. I don't believe there is another record.

Q. Do you recall at the time the deposition was taken we asked you to provide for us the records showing where snow was removed from this particular walk? Do you remember that question?

A. Yes. I don't know whether I was able to do it or not.

Q. But do you recall you provided these papers in connection with that deposition?

A. Yes, that's right.

Q. Now, calling your particular attention to this same paper and the words "Removing icicles from Co-Op Store," do you [33] know whether that relates to the General—what do we call this building, the General Store Building?

A. Yes, it does.

Q. And referring you specifically to the photograph marked plaintiff's exhibit number 12, you find the words "Co-Op Store" on that photograph right next to this doorway? A. That's right.

Q. Would you say, then, that this removing of icicles referred to in plaintiff's identification 17 indicates that icicles were removed from the edges along the north side of the General Store Building on the 28th of January, 1949?

A. It does, if that is the date on it, yes.

(Testimony of Chester E. Benjamin.)

Q. That is the date, is it not?

A. That's correct.

Q. Referring to the same part of plaintiff's identification 17 that we've been talking about all this time, we find the words "Plowing snow and sanding streets"; does that relate to a sidewalk job?

A. No, that's the snowplow on the highways.

Q. All right. Now referring, Mr. Benjamin, to the daily labor report dated January 27, 1949, the day shift, which is also part of plaintiff's identification number 17, and calling your attention to the wording "Shoveling snow off sidewalks"—"Shoveling snow on sidewalks," it says— [34]

A. You shouldn't criticize the grammar of my crew.

Q. It indicates they spent 16 hours doing that, is that correct?

A. Yes. I would like to change that preposition from "on" to "off."

Q. You have my consent; and that relates to the sidewalk in front of the General Store Building, does it not, on the north side of the General Store Building?

A. Not necessarily.

Q. It could?

A. It could.

Q. And is it not correct that this is one of the papers you provided in response to our request at the deposition to bring the records showing the removal of snow from sidewalks in front of this mezzanine doorway? This is one of the documents, is it not?

A. No, you didn't ask me that when you asked

(Testimony of Chester E. Benjamin.)

me to furnish these documents. You asked me to furnish documents showing the government shoveled snow off sidewalks, and this is one of them.

Q. Do you mean that you do not feel that that indicates snow was shoveled from in front of this doorway on the 27th?

A. I don't think it would be positive proof, although it could mean that.

Q. It could mean that? [35]

A. It could.

Q. You are satisfied that it might?

A. It might mean that, yes.

The Court: Do you have other documents that you didn't produce that show shoveling at that time?

A. No. Your Honor, this might mean the sidewalks across the bridge.

The Court: Well, did you hold back some documents that show removal of snow?

A. No, your Honor. It is not all, but it is a portion of that. The gentleman who is questioning me did not ask if this was all of them. This is from that group.

The Court: Well, you knew what he wanted, didn't you? You knew about this lawsuit?

A. He didn't accept them all, your Honor. I gave him every document we had that showed movement of snow at that time. He didn't accept them all. He accepted these.

Q. (By Mr. Wolff): Well, you recall, Mr. Benjamin, what we were looking for when we were down there, the same thing we're talking about

(Testimony of Chester E. Benjamin.)

now, the removal of snow and ice from this particular walk in January, 1949?

A. I remember that.

Q. And these are the papers you gave us that were closest to showing it?

A. These are a portion of them. [36]

The Court: If you've got other documents that show that, Mr. Benjamin, I'll send you back to get them. We're not going to quibble about that; if you've got anything else material to this lawsuit you can go and get them, and I'll order you to do that.

A. Your Honor, may I explain?

The Court: Go ahead.

A. I brought all the labor records up for these gentlemen. I didn't know what they were attempting to prove.

The Court: You knew the scene of this accident?

A. Yes, sir.

The Court: Didn't it occur to you they might want to know the conditions pertaining to this particular location?

A. That's correct.

The Court: Didn't you bring the documents pertinent to that?

A. If they're here, he has them.

The Court: I see. Go ahead. This lawsuit isn't a poker game; we're trying to get at the facts here. I think there might be a little more frankness and disclosure here. We're not trying to play

(Testimony of Chester E. Benjamin.)

a game of some kind. I'm trying to get the facts so that I can fairly and according to the law decide this case.

Q. (By Mr. Wolff): You recall, Mr. Benjamin, in connection with [37] the deposition, I asked you this question: "Did you clean——

Mr. Kelley: What was the page?

Q. 58. "Did you clean any snow off the sidewalk at the point where Mrs. Phillips fell on the 28th of January, 1949?" You remember that?

A. I do.

Q. And the answer you gave, "If we removed ice on that day, we removed it from the sidewalk, yes, sir." You recall giving that answer?

A. That's a correct answer.

Q. Now, we asked you this question: "Do you have some records that would show?" You recall we asked that question? A. Yes, sir.

Q. And your answer, "I believe the time books would show, if they are still in existence." Next question, "Well, did your office, or, let's put it this way: was snow and ice ever removed from this sidewalk along Roosevelt Avenue next to that building by the Bureau, was it at any time?" Do you recall that question? A. Yes.

Q. And your answer, "Before or after?" Do you recall that you put it that way?

A. I think so.

Q. And the next question, "Yes, at any time?" and the next answer, "Yes, I believe so." Do you recall that answer? [38] A. Yes.

(Testimony of Chester E. Benjamin.)

Q. Question, "Can you state when?" Do you recall that question? A. Yes.

Q. And your answer, "No, not definitely." Do you recall the answer? A. Yes.

Q. Next question, "Can you state whether it was before or after Mrs. Phillips fell?" Do you recall the question? A. Yes.

Q. Answer, "I think both before and after she fell." And that is true, isn't it?

A. That's true, yes, sir.

Q. So the Bureau did clean the walk both before and after she fell along Roosevelt Avenue in front of that doorway? A. That's correct.

(Short recess.)

The Court: All right, go ahead.

Q. Another question, Mr. Benjamin, please. How big a crew did you have in January of 1949 working on sidewalk cleaning?

A. Oh, that would be hard for me to answer without checking.

Q. Well, isn't it a fact that the papers before you show that on many days you had six or eight men, at least, working on that? [39]

A. I think that would be fair.

Q. You had more men available; if you needed them for that work you could have taken them off other jobs? A. That's correct.

Q. So you had a very substantial crew for that work when you needed it?

(Testimony of Chester E. Benjamin.)

A. That would be a very small percentage of my crew, but it would be a fair crew.

Q. You indicated that you were the city inspector and that you had inspected the roof condition three almost daily, and the same is true of the sidewalk, is it not? A. Yes.

Q. At that particular point. Isn't it also a fact that the ice conditions on that roof presented a problem that kept you quite busy?

A. Well, they presented some problems to me, if that's what you mean. They didn't keep me busy, of course.

Q. You knew that the ice hazard was a real hazard on the eaves of that roof?

A. I was aware of the hazard, yes.

Mr. Wolff: I'd like the Court to rule on the admissibility of the exhibit we last referred to. I think it has been fully identified.

The Court: Well, I think we got off the track a little here, perhaps, going into the contents of them. I [40] had indicated that I would, with the objection of the defendant in mind as to what they show, admit them for what they're worth, and 16 and 17 will be admitted.

The Clerk: 16 has not been offered, your Honor; he has not examined on that.

The Court: Oh? 17 is the one, then.

(Whereupon, Plaintiff's Exhibit No. 17 for identification was admitted in evidence.)

Q. (By Mr. Wolff): Now, Mr. Benjamin, there

(Testimony of Chester E. Benjamin.)

is no doubt in your mind now that you did remove snow and ice from the walk of the General Store Building on January 28, 1949, isn't that correct?

A. I would say that we probably did. I couldn't swear to that.

Q. Well, I'll call your attention to the deposition we took at Coulee Dam, referring to page 71, and ask if you remember this answer: "Here is our daily labor report, which indicates that we removed snow from the sidewalks through the town and removed it from the walks of the Administration Building and General Store Building." Do you recall that answer? A. I think I do, yes.

Q. And that is correct, isn't it?

A. That's probably more correct than my answer now, that I can't remember too well for sure whether we did or not. [41]

Q. And the next question, "On the 28th day of January, 1949?" and the answer, "Five hours and a half and the plowing of the snow and there was one man, eight hours, which indicated that the work began at 8:30 in the morning," so it is a fact that on that day your crew removed the snow and ice from the sidewalk of the General Store? A. I think that's true.

Q. And before and after that you had done the same?

A. Yes, other dates, frequently.

Mr. Wolff: That's all; your witness.

(Testimony of Chester E. Benjamin.)

Cross-Examination

By Mr. Kelley:

Q. Now, Mr. Benjamin, as I understand it, you haven't any personal knowledge of the removal of either snow or ice in front of the entrance as shown by the plaintiff's exhibit 12; you haven't any personal knowledge yourself?

A. You mean did I see them do it?

Q. Yes. A. I didn't see them do it, no.

Q. And you didn't do it yourself?

A. That's correct.

Q. And what you're testifying is in reference to records? A. That's true.

Q. Have you produced all of the records relative to the removal of snow and ice on or about, before or after this date, January 28, 1949, at this place we're discussing? [42] A. Yes.

Q. And do you want the Court to understand that what you're testifying to is what's related in these records, exhibits 16 and 17?

A. That's true. You understand that I have many men who are ordered to do work, and they come back and tell me they have done it, and I rarely observe that it has been done; I assume the man has told me the truth, but I must go by what other men tell me in many cases.

Q. And by the way, did you tell that to Mr. Wolff on the occasion of your deposition down at Coulee Dam, in substance?

(Testimony of Chester E. Benjamin.)

A. Did I tell him that?

Q. Yes. A. What I've just told you now?

Q. Yes. A. I don't recall.

Q. Do you recall when he asked you the names of the witnesses—on page 57, Mr. Wolff—the question, “Do you know their names?” Answer, “No, I wouldn't know. I know who they could be but they could be anyone.” A. I recall that.

Q. Was that the situation then? A. Yes.

Q. Was that the truth of the matter? [43]

A. That's the truth any time in my work.

Q. As I understood you, Mr. Benjamin, in response to counsel's questioning, this sidewalk we're talking about extends the whole length of the store building as shown in exhibit 12?

A. On that side.

Q. On the north side? A. Yes, sir.

Q. And just for the record could you take a look at exhibit 7 and tell the Court approximately what the dimensions are of that building, and how long it is on the north side?

A. If I recall correctly, this building is 220 feet long, and 100 feet wide. It has on the north side a sidewalk—I'm guessing, now—but in the neighborhood of 8 to 10 feet, perhaps, wide, extending the full length of the north side. It has no sidewalk on the west side. It has a small blacktop walk perhaps 4 or 5 feet wide on the south side, and a wooden walk which is underneath a porch on the east side, a covered walk.

Q. Now, with respect to this doorway that coun-

(Testimony of Chester E. Benjamin.)

sel has asked you about, doorway to the mezzanine shown in plaintiff's exhibit 12, that leads to the mezzanine?

A. Yes, it leads to a stairway that goes to the mezzanine.

Q. And that, as you indicated, that doorway and that stairway does not lead to any of the places of business shown on the main floor there, as shown on plaintiff's exhibit 7? [44]

A. It does not lead to any of these places.

Q. That is, just for the record, by "these places" you mean the dry goods and furnishings and hardware and the dime store and the drugs and the fountain and the groceries, produce and meat, the post office, bank, or the storage room?

A. It does not lead to those spaces.

The Court: Where is the entrance to those downstairs, first floor stores?

A. There is the entrance.

The Court: You're indicating now on the south side of the building?

A. This is the north side.

The Court: Oh, I see; there's another entrance along the north side.

A. There's one here, one here, the small truck entrances on the back, not shown; this is the post office entrance, and there's now a store at that point, Sears Order Office, and there's the bank.

Q. Then to sum it up, this doorway to the mezzanine is the only entrance up to the mezzanine floor?

(Testimony of Chester E. Benjamin.)

A. There's a fire escape, but it's not used as an entrance.

Q. I see; and you said a moment ago that that led to a place of business; is that the beauty salon formerly operated by Mrs. Bessie Dumas? [45]

A. Yes.

Q. And that is the beauty salon operated by Bessie Dumas as the premises described in the lease, being exhibit 15?

A. Yes, this appears to be her lease, a copy of it.

The Court: I'm not too clear on that, now; is the beauty parlor on the mezzanine floor?

A. Yes, sir.

The Court: And the stairway leads up to there?

A. And distributes to her shop and others.

Q. (By Mr. Kelley): To clear that up, that stairway goes to the beauty parlor?

A. It does.

Q. And the beauty parlor is separate and apart from, and on another floor from the rest of the tenants shown on the main floor as shown in plaintiff's exhibit 7?

A. Yes.

Q. And the customers of the beauty salon would be using that doorway to the mezzanine?

A. That's the only way they can get up.

Q. That's the only way they can get up and come out?

A. They can come out down the fire escape, and some of them do.

(Testimony of Chester E. Benjamin.)

Q. I see. The Bureau of Reclamation or the government in this case had never removed any snow from the roof of this building that you've called the General Store Building, has it? [46]

A. You're differentiating now between snow and ice?

Q. That's right.

A. No, we do not remove snow.

Q. And on the occasion of your deposition, and have you brought with you now, the records relative to repairs to the roof, gutters and eaves, for two or three years prior to January 28, 1949?

A. I have copies of any such records in existence.

Q. And I didn't understand you when counsel asked you about the overhang of the eaves. What is the situation there?

A. This is a simple overhang where the rafters overhang the wall about 28 inches, and on the outside edge of the end of the rafters are structural hangers that support what we call in the profession a hung gutter, that's a half-round eaves trough from which come down a few downspouts to bring the water down. The over-all dimension outside the gutter is probably about 32 inches, and about 28 inches to the inside.

Q. These eave troughs are adequate for any normal weather problem referred to by counsel, are they not?

A. Any normal weather problem, yes.

Q. Yes, and the winter of January, 1949, and

(Testimony of Chester E. Benjamin.)

the month of January, 1949, in particular, that was one of the most severe winters you had experienced down there in the past ten years? [47]

Mr. Wolff: Before you answer, please; your Honor, I object to that question; if he's going into that matter he's making the witness his own witness, and the witness is subject to cross-examination, of course, and leading questions wouldn't be permitted. I think that was a very leading question.

Mr. Kelley: I didn't intentionally go into new matters.

Mr. Wolff: The severity of the winter is a part of the affirmative defense, and certainly something we didn't go into on direct examination.

Mr. Kelley: I thought that he'd asked about some problems in connection with the roof, if your Honor pleases.

The Court: Yes, I think he did go into that. I'll overrule the objection.

Mr. Kelley: Would you read that question, please?

(Pending question read by the reporter.)

A. Yes.

Q. Now, in that most severe weather there wasn't any method of preventing the eaves troughs from freezing over in the severe weather, was there?

A. No.

Q. And by the way, who built that building?

A. The building was built by the Mason-Walsh-Atkinson-Kier Company for one of their splinter

(Testimony of Chester E. Benjamin.)

subsidiaries, called the [48] Coulee Trading Company.

Q. Is it under the direction and supervision of the government? A. Now it is, yes.

Q. Can you tell the Court how long it has been?

A. I believe the government had that building returned by the contractor in the fall of—I think it was '41, and it might have been '42. Time goes along pretty fast.

Q. In your opinion there's nothing defective in the construction of those eaves troughs, Mr. Benjamin? A. No.

The Court: Is it a wood frame building?

A. Yes, your Honor.

Q. Couldn't you just briefly and generally describe to the Court the nature of the building with respect to its construction?

A. The building is built of ordinary frame construction, 2 by 6 studding, on concrete footing walls. The interior floors are supported on wood piers, wood posts on concrete blocks. The main floor is quite heavily constructed, being what we call car decking, 2 by 6 tongue and groove covered with linoleum. The walls extend up to a series of trusses which support the roof. These are lightly built; we used to call it saloon framing in the old days, sheathed with ship-lap, covered with mineral surface roofing paper. The [49] building is a temporary structure, not finished with plaster, but with ordinary fir-tex or fibre board lining.

Q. By the way, that sidewalk on Roosevelt Ave-

(Testimony of Chester E. Benjamin.)

nue, you've been asked about what is the percentage of the grade?

A. I think 6 per cent; in other words, 6 feet in 100 fall.

Q. 6 feet for every 100? A. Yes.

Q. Did you as a building inspector climb up on that roof or inspect personally the gutters and eaves January 28, 1949?

A. No. I could see that from the ground; I don't have to get up on it.

Q. And you have brought or you have shown to counsel and you have with you all records of any manner, shape or description relative to this building on or about that time?

A. He's seen them all.

Mr. Kelley: That's all.

The Court: Under the circumstances you may ask leading questions, if you wish, Mr. Wolff.

Redirect Examination

By Mr. Wolff:

Q. Mr. Benjamin, you indicated to Mr. Kelley that the government doesn't remove snow from the roof of the building. The fact is, is it not, that the snow melts because of the heat loss through the building roof?

A. I can't answer that question by yes or no. I can explain to you what does happen. [50]

Q. Isn't it a fact there is a substantial heat loss through the roof of that building?

(Testimony of Chester E. Benjamin.)

A. Well, there would be a normal heat loss through the roof and the walls in all directions.

Q. And the snow on the roof melts because of the heat loss, doesn't it?

A. Either that or a rise in outside temperature, or both.

Q. So for those reasons it's never been necessary for you to remove snow from that roof?

A. That isn't the reason. The reason is the snow at Coulee Dam is a very light water content, and isn't heavy enough to worry about.

Q. So you've had no concern about the snow?

A. Not about the snow.

Q. But the ice has bothered you?

A. The ice caused me some concern, because it piles up at the edge of the building, and I have to watch the weight of the snow to prevent it from breaking off the eaves or falling on pedestrians.

Q. That's true most every winter, isn't it?

A. Yes, I think most winters.

Q. And while the 1949 winter might have been a severe one, it didn't materially change the picture as to the ice accumulations on those eaves; it had always been a problem, hadn't it? [51]

A. The problem is not always present in winter. It's present when the temperature reaches a point where the heat loss through the roof melts the snow, causing it to run to the edge, at which minute it freezes; there's where it accumulates along the edge of the eaves on there; it doesn't even reach the gutters, but piles up thick on the roof, some-

(Testimony of Chester E. Benjamin.)

times that deep. It's due to the differential of the outside and inside temperatures that causes it.

Q. And that problem has been present in 1948, 1947, has it not? A. I think so.

Q. And in 1950, this last winter? A. Yes.

Q. As a matter of fact, during this last winter didn't you try some kind of a steam device up there?

A. No, not last winter.

Q. When was that?

A. Tried that prior to 1950.

Q. The year before Mrs. Phillips fell, then, '48?

A. Yes, I think it was around 1948 when I used a steam boiler and attempted to melt the ice from the edge.

Q. How did the winter of '48 compare with the winter of '49 as to severity of conditions?

A. Well, it wasn't as cold, or as much snow, but I had as much trouble with ice due to this differential in the [52] temperatures.

Q. You belong to the Rotary Club there at Coulee Dam, Mr. Benjamin? A. Yes.

Q. Did you in January, 1949, belong to the Rotary Club?

A. I don't believe so. I can't recall, but I think I joined about April, 1949.

Q. Do you know that Mrs. Phillips is a member of the Ladies' Rotary?

A. I believe she is, yes.

Q. Do you know whether she has been active in that organization since January, 1949?

A. Yes, I think she has.

(Testimony of Chester E. Benjamin.)

Q. Just what were her activities? Well, let's put it this way, Mr. Benjamin; I may not make myself clear. Do you know that she's been a member; you've indicated that. When I ask you whether she has been active, what I want to know is whether she has taken an active part and participated personally in the various activities of that organization since January, 1949?

A. I can't answer that question by yes or no. The Rotary Club does not recognize the women. That's entirely aside.

Mr. Kelley: That is a faux pas.

A. What they do is their own business.

Q. Yes. Well, have you had any occasion, then, to observe [53] whether or not she actively participated in the Women of Rotary? Maybe you have not, I don't know.

A. I think she's been in some of the social functions of the women. Sometimes the women give a party for the men, and we recognize them at such times.

Q. You'd be unable, then, to compare her activity in the organization before and after the fall?

A. I couldn't say.

Q. I see. All right. Now, you know, Mr. Benjamin, that the Dumas beauty parlor isn't the only premises on the second floor of this building?

A. Oh, I didn't say they were.

Q. No, I know you didn't. I just wanted to make that clear. A. That's correct.

Q. And we call it a mezzanine, but it's a full

(Testimony of Chester E. Benjamin.)

story, isn't it? There's no open well in the center?

A. Somewhat less than half the total area of the building.

Q. I don't know the definition of a mezzanine, but there's nothing but floor space on the second floor, it's not related to the first floor in any way, isn't that right?

A. Mezzanine is generally a half story or a portion of a story, not a full area over the entire building.

Q. There's no open well area to the first floor?

A. It's a little grander than a balcony.

Q. There's no open area to the first floor? [54]

A. Only a freight elevator.

Q. There's not a railing around the first floor?

A. It's fully enclosed.

Q. The floor fully covers the area except for the opening for the elevator?

A. No, it does not cover the area of the entire building; it covers the complete area of the second floor.

Q. In other words, the floor space on the second isn't as much as on the first floor, but there's no open well as we often think of a mezzanine, as being a glorified balcony?

A. Only a stairway.

Q. What's the square footage on that second floor, if you know? We call it the mezzanine.

A. Well, if you want to do a little quick calculating, it's about two-fifths of 220,000.

Q. 220,000 is the main floor?

(Testimony of Chester E. Benjamin.)

A. That's right.

Q. It's about two-fifths of that. Well, let's see what that is; about 88,000 square feet?

A. I didn't figure it. I'll leave it up to you.

Q. How many square feet in the Dumas Beauty Parlor, do you know?

A. I believe the lease would show that; it's a fairly small section.

Mr. Wolff: That's all the questions. [55]

Recross-Examination

By Mr. Kelley:

Q. What does the lease show?

Mr. Wolff: I think it says 400 square feet, doesn't it, Mr. Benjamin?

A. Just a minute, I'll see.

Mr. Wolff: Paragraph number 1, on the first page, near the bottom of the page.

A. 400 square feet, more or less.

Q. (By Mr. Kelley): Do the Beauty Salon employees clean the entrance to the mezzanine there that you've been talking about?

Mr. Wolff: What was that question?

(Pending question read by the reporter.)

Mr. Wolff: The question should be made more definite and specific as to time.

The Court: Well, we can go into that later.

A. The answer, as the question is worded, is no.

Q. Did they about January 28, 1949, or before?

A. I don't believe they ever do.

(Testimony of Chester E. Benjamin.)

Q. As far as you know?

A. As far as I know they do not.

Mr. Kelley: That's all.

(Whereupon, there being no further questions the witness was excused.)

The Court: Call the next witness. [56]

THOMAS HUBBARD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your name to the Court, please?

A. Thomas Hubbard; full name Thomas William Hubbard.

Q. Where do you live, Mr. Hubbard?

A. Coulee Dam.

Q. What's your work?

A. Powerhouse operator.

Q. Who do you work for?

A. The Bureau of Reclamation.

Q. Have you lived there long, at Coulee Dam?

A. Well, my residence has been there for the past almost ten years, since January 12, 1942. I was in the service part of that time.

Q. This lawsuit, Mr. Hubbard, relates to an alleged fall that Mrs. Homer Phillips had on the sidewalk in front of the General Store Building in

(Testimony of Thomas Hubbard.)

Coulee Dam. Do you know where the General Store Building is? A. Yes, I do.

Q. Are you familiar with the sidewalk in front of the entrance to the mezzanine floor there?

A. Yes.

Q. Calling your attention to January 28, 1949, did you have occasion to notice the condition of the sidewalk in front [57] of that entrance-way?

A. I did.

Q. When did you see it?

A. Well, it was in the morning, probably around approximately 11 o'clock, at which time I came out of the—do you want me to go into the details?

Q. Go ahead.

A. I came out of the Co-Op store with my young daughter, and I thought that the sidewalk was too dangerous——

Mr. Kelley: I object to this.

The Court: Yes, that is objectionable; it will be stricken. Just tell what the conditions were, and not your conclusions.

Q. (By Mr. Wolff): Your opinion as to how dangerous it was isn't proper at this time. Go ahead and tell what you saw.

A. I saw the ice and snow and icicles on the walk at this time, particles of icicles not broken.

Q. You're referring to the area right in front of the entrance to the mezzanine?

A. Yes, and also by the Co-Op store. There's two elevations there to that sidewalk.

Q. Let's see the photo. I want to show you,

(Testimony of Thomas Hubbard.)

Mr. Hubbard, this picture that's called plaintiff's exhibit number 12. On this photo you see a mark "doorway to mezzanine"; is that the doorway you're talking about? [58] A. Yes.

Q. Where is the Co-Op store that you mentioned?

A. Here; that's the entrance to the Co-Op store.

Q. Up to the left, where the sign "Drugs" is?

A. Fountain, Drugs, Souvenirs. That's one entrance to the store.

Q. Is that the one you said you came out of?

A. That's the one.

Q. About 11 o'clock the morning of the 28th?

A. Approximately 11:00 o'clock.

The Court: When you say "here," that's not going to indicate on the record what you mean on the picture. He's indicating the extreme left hand entrance way shown on the picture.

Q. And you identified it as the point where the drug sign appears? A. The drug sign.

The Court: All right.

Q. And you indicated that you saw icicles on the sidewalk? A. Yes.

Q. State just what you saw in regard to icicles on the sidewalk. Well, first, just a moment. Were there any icicles on the sidewalk in front of the doorway to the mezzanine?

A. Right at that particular time when I came out of the door I wasn't—that was far enough out of my—where I wanted [59] to get that I didn't pay any attention right at that particular moment,

(Testimony of Thomas Hubbard.)

when I came from the grocery store. When I refer to this, I am referring to the entire sidewalk from the point where the drug sign is, this way, because there are two different elevations of sidewalk here. The pitch from in here changes for a short distance.

Q. You mean the slope of the walk?

A. Not the pitch of the sidewalk, the slope of the sidewalk running east and west.

Q. Well, is there a particular point where this slope changes, or is it gradual?

A. Well, it starts, I don't know whether you'd call it abrupt or not, but it's west of the entrance of the Co-Op Store, very slightly, where this change in elevation takes place, and it goes down below the entrance to the mezzanine, and the distances there I don't know, but that's the east and west slope.

Q. Did I understand you to say you did have occasion to see the condition of the walk in front of the door to the mezzanine?

A. Yes.

Q. And when did you see that condition?

A. At the time that Mrs. Phillips fell.

Q. Did you see her fall?

A. Yes—no, I'll retract that statement. I didn't see Mrs. [60] Phillips fall. I saw her when she came out the door, and at that particular time I happened to glance down, helping my daughter up a little stairway, and when I looked down to help her up, I heard the scream or the yell——

Q. You saw everything but the fall, the moment before and the moment after?

(Testimony of Thomas Hubbard.)

A. I saw the moment before and the moment after.

The Court: It's time for recess; we'll take a recess now until 1:30.

(Noon recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued.)

By Mr. Wolff:

Q. I think we were trying to determine whether you knew the condition of the sidewalk at the point where Mrs. Phillips fell. I might ask you, then, if you can state just where she fell, identify it as best you can. A. It is——

The Court: May I suggest this; you may very likely have other witnesses referring to points on that map. I wonder if it wouldn't be wise to have them make an X and put their initials on it, then no matter how many you have you can identify it.

Q. (By Mr. Wolff): Now, this is the road, you know.

A. This is the street. You wanted me to approximately put a [61] mark there where Mrs. Phillips was?

Q. Identify the place where she fell.

A. The cars are in the way between the sidewalk and——

Q. I might suggest that plaintiff's exhibit num-

(Testimony of Thomas Hubbard.)

ber 7 might give you a better opportunity to make that clear.

The Court: The place where she fell is obscured by the automobiles in that picture, exhibit 12?

A. Yes.

The Court: All right, mark it on the map, exhibit 7.

A. As near as I can tell, it was approximately right in here. I'll initial the point there. It might be inches one way or inches the other.

Q. You put "T. W. H."?

A. Yes, those are my initials.

Q. From your indication it appears to be within the boundaries of the two edges of the door, at least in a north and south direction. Her fall was not outside the point where the side of the door would be, was not down the sidewalk from there?

A. No, it wasn't.

Q. And it wasn't up the sidewalk from the other point of the door?

A. No, it wasn't. Of course, when she fell, of course, her feet sliding out from her could have been past the door——

Q. Which way would her feet be? [62]

A. Her feet were pointing westerly, or down grade.

Q. And in relation to the front wall of the building, explain where this point is. Is it so many feet out on the sidewalk from the wall of the building, or just where is it?

(Testimony of Thomas Hubbard.)

A. Well, I can't show you in this picture here.

Q. Well, state as best you can.

A. It could have been 3 feet, it could have been 4 feet, or 5 feet, approximately between 3 and 5 feet out from the door.

Q. All right, and what time of the day did you see the condition of the walk there?

A. Approximately 11 o'clock, maybe a little before, maybe a little after.

Q. All right, now will you describe as best you can the condition of the ice and snow on the sidewalk at that time and at that point?

The Court: I'm not sure whether this refers to the first time when he came out of the building, or when Mrs. Phillips fell. Which is this 11 o'clock?

Q. Can you answer that, Mr. Hubbard?

A. Well, I saw two different ice conditions, two different walk conditions; when I came out of the store, and also at the time Mrs. Phillips was on the walk.

Q. You mean that the ice condition at the time she fell was different, when she fell, than it was the first time? [63]

A. I didn't come by there the first time. When I helped assist Mrs. Phillips there, when I saw that particular walk at that point there——

The Court: About what time was it when you came out of the building that morning?

A. I don't exactly remember; it was between 10 o'clock and 11 o'clock, because I went to the barber shop.

(Testimony of Thomas Hubbard.)

The Court: Then how much later was it when you saw Mrs. Phillips, when she fell?

A. It was in the neighborhood of 11 o'clock.

The Court: Less than an hour intervened, then, between the two?

A. Yes; as I recall the shop wasn't overly crowded on that particular morning.

Q. (By Mr. Wolff): I'm not sure I understand. You saw the condition of the walk at around 10 o'clock, roughly? A. Yes.

Q. Tell us what that condition was?

A. Well, I don't say 10 o'clock; it's approximately 10 o'clock.

Q. I understand, sure.

A. The walk was in such an icy condition that I didn't want to travel down that particular section of the street; I went around it; I went into the street and went around that section of the sidewalk and came back onto it along here some place, at a point I don't exactly remember. [64]

The Court: If I understood your testimony correctly before, you didn't at that time observe the condition of the walk as to ice and snow in front of the mezzanine door?

A. This point between this door here, we'll say, where you come out of the Co-Op, and down here, it has another change in elevation.

The Court: Well, read that question of mine; see if he can't answer that. See if you can't pay attention to it.

(Testimony of Thomas Hubbard.)

(Last question by the Court read by the reporter.)

A. No, I didn't, your Honor, right at the door. It was beyond the point of the door where I traveled around.

Q. So at the point where Mrs. Phillips fell you didn't see the condition at 10 o'clock? A. No.

Q. All right, when did you first see the condition at the point where Mrs. Phillips fell?

A. When I came up there, when she was on the ice, it was at that time that I saw the condition in front of the door.

Q. And about what time would you say that was?

A. That would be approximately around 11 o'clock.

Q. All right, now tell us what the condition of the ice was around 11 o'clock.

A. There were icicles, broken, apparently they had fallen off [65] or been knocked off, I don't know which, and there was a ridge of ice out from the door that had built up, and it was rough, but it was very slick and glared.

Q. About how high had it piled up?

A. Well, I would say three or four or five inches. It was noticeable, where it had dripped and had frozen at that point.

Q. Was it possible for a person to come out of the mezzanine door without stepping on the icy condition that you've just described?

A. No, it wasn't.

(Testimony of Thomas Hubbard.)

Q. You mentioned that icicles had dripped and frozen. Where did the drips come from?

A. From the eaves troughs, probably originated on the roof.

Q. Can you point out just where this ridge of ice was that you described, in relation to the building itself?

A. Well, it was out from the edge of the building about—this morning he said from 26 to 32 inches. Well, that could be the distance. It could be anywhere within that.

Q. State whether or not it was right at the point where Mrs. Phillips fell?

A. No, it wasn't exactly right on the point, the big ridge of ice, because that apparently is what she fell on. The ice had melted out from the building and ran out, with the pitch of the sidewalk, ran out toward the street and was frozen. [66]

Q. Did it appear to you that pieces of icicles had frozen into this mass on the walk, or was it just drippings of water that froze?

A. No, it appeared to be pieces of icicle, lying around there.

Q. Do you know how long the condition existed prior to 11 o'clock of that day?

A. No, I don't. I have no idea.

Q. Do you know whether it was that way the day before, or the week before? A. No.

Q. I believe you indicated this morning that you saw Mrs. Phillips just before she fell. Was there anything unusual about her conduct before she fell?

(Testimony of Thomas Hubbard.)

A. No.

Q. She was alone? A. She was alone.

Q. Was she walking fast or slow?

A. No, as I can remember, happening to look up the street, it appeared to me that she was hesitant before she went to step out there, and that being about the time that I looked down.

Q. Do you know just the point where she slipped, or merely where you saw her lying?

A. Merely where I saw her lying.

Q. And after she fell I think you said you heard her cry out? A. Yes. [67]

Q. What did she say, and tell us what happened as you looked up?

A. I don't remember what she said when she cried out. I heard her make the cry, and happening to look up at the time, I saw, I assumed, that she was injured.

Q. What did you do next?

A. I ran up there as rapidly as I could, trailing my young daughter, and tried to give what assistance I could.

Q. And will you then describe just how Mrs. Phillips lay on the ice when you arrived?

A. She was lying on her side, as I recall, with her feet toward the west, down grade, and her clothes were disarranged, and I don't remember who pulled her dress down, or anything, but I know the girls came along at that time and started peeling off their coats to give her what comfort they could, because she was complaining about her

(Testimony of Thomas Hubbard.)

ankle, I believe it was her ankle at that particular time, and the girls wanted to be sure that she was kept warm, and while they were talking with her I went to put in a call for the ambulance.

Q. It was you that called the ambulance?

A. I didn't call the ambulance; Mrs. Ted Atwater was at the phone, and I asked her if she would call the ambulance, that Mrs. Phillips had been injured outside the building.

Q. Do you know whether Mrs. Phillips' body was in direct contact [68] with the ice, or did she have clothes between her and the ice when she was lying there?

A. As near as I can make out from her complaints at that time, she was in direct contact with the ice, and no clothing in between.

Q. What part of her body was in contact with the ice?

A. Well, knees, legs; on that I couldn't say.

Q. Did she indicate what part of her body was suffering from injuries, if any?

A. She was complaining of "my ankle; don't move my leg," or "don't move my ankle." I don't recall, it was one or the other.

Q. Who were the two girls that arrived that you mentioned? Do you know their names?

A. No, I don't. I didn't know the girls at that time.

Q. Do you know who else came upon the scene before she was moved?

A. Yes, Mr. Neuman.

Q. Is that Ernest Neuman?

A. Yes.

(Testimony of Thomas Hubbard.)

Q. A milkman? A. Yes.

Q. Anybody else?

A. And there was a man, I don't recall what his name is, but he is in the audience here. [69]

Q. He's in the room today? A. Yes.

Q. Anybody else that you can describe or name?

A. And Mr. Alberts of the Coulee Dam stores.

Q. Do you know who moved her from the ice?

A. Yes, after I had gotten back out they were in the process of getting her, and I helped carry her into the store.

Q. Do you know that Mrs. Phillips is quite a large woman? A. Yes.

Q. How many men did it take to move Mrs. Phillips from the ice?

A. There were four of us.

Q. All four of you took part in the actual movement? A. Yes.

Q. Where was she taken, then, Mr. Hubbard?

A. She was taken into the store, right at the general entrance of the Co-Op store.

Q. Would you be able to estimate how long she lay on the ice before she could be moved?

A. Oh, it could have been ten minutes.

Q. And she was laying on the floor in the Co-Op store, then? A. Would you repeat that?

Q. She was taken into the Co-Op store and she was laid on the floor? A. Yes.

Q. And how long did she lay on the floor, if you know? [70]

A. I don't know, because there were so many

(Testimony of Thomas Hubbard.)

people around, and the audience so large, that I pulled away from the scene and stood back.

Q. Did you follow the procedure any further from that point?

A. No, all I saw was the ambulance, or the—yes, the ambulance come in a little while later, a few minutes later, back in there, and saw the doctors come in, but I didn't see her removed.

Q. How many doctors came, if you know?

A. There's one that I know of.

Q. One doctor, and did I ask you how long she lay there before she was removed from the floor?

A. I believe you asked me. I think it was probably around ten minutes, approximately about ten minutes.

Q. And did she indicate any suffering while she lay there on the floor?

A. I wasn't there; I don't know.

Q. When did you see Mrs. Phillips next after that?

A. It was quite some time later that I saw Mrs. Phillips. In fact, the first time that I saw her was when you people were at Coulee Dam last fall.

Q. When we came up to talk to her and you to see what the facts were?

A. Yes.

Q. That was in October, wasn't it? [71]

A. In October.

Q. That was the next time you saw her?

A. That was the next time I saw her.

Q. Will you state whether or not she appeared

(Testimony of Thomas Hubbard.)

to have any after-effects of that accident when you saw her in October, 1950?

A. She apparently did at that time. She was limping and walking with a cane, where the first time that I had known who Mrs. Phillips was and saw her she wasn't walking—wasn't crippled nor walking with a cane.

Q. You knew her before you saw her on the ice, then?

A. I didn't know her; I knew who she was.

Q. She didn't walk with a cane then, or limp?

A. No.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelley:

Q. I believe you said, Mr. Hubbard, that you had lived down at Coulee Dam for the past ten years? A. Approximately, yes.

Q. And in the past ten years the winter of 1949 was the first real cold weather that you experienced down there at Coulee Dam since 1937, wasn't it?

A. I don't know. I know that it was an exceptionally cold winter.

Q. It was the coldest winter since you had been at Coulee Dam? [72]

Mr. Wolff: Object; this is beyond the scope of the direct examination, as to the severity of the weather.

Mr. Kelley: I would think it's proper.

(Testimony of Thomas Hubbard.)

The Court: Well, overruled.

Mr. Kelley: Will you read him the last question, please?

(Pending question read by the reporter.)

A. Yes.

Q. And as a matter of fact, it had the greatest snowfall since you were at Coulee Dam?

A. That's right.

Q. And during that winter of 1949, and the month of January particularly, and more specifically on or about the two or three days preceding January 28, 1949, the snow fell in the daytime and froze at night, did it not?

A. Well, I don't know that you would call it snow. It's a sort of a precipitation condition that we have there that isn't prevalent in most other parts of the country.

Q. Sort of a Coulee Dam mist?

A. Yes, a mist or frost.

Q. Well, in any event it was bad weather conditions when you first took your little daughter and went into the General Store Building there, prior to Mrs. Phillips' fall, isn't that true?

A. Yes. [73]

Q. And as a matter of fact, as you recall, you went in the barber shop around about 10 o'clock or so?

A. Somewhere, approximately.

Q. In any event, maybe about an hour or so before Mrs. Phillips fell?

A. Well, I don't think that it was an hour.

(Testimony of Thomas Hubbard.)

Q. I see. Well, at the time before Mrs. Phillips fell that you went into the General Store, it was snowing at that time?

A. No, I don't think so.

Q. It wasn't? A. No, sir.

Q. Well, when had it stopped snowing, then?

A. I don't recall the time that it had stopped snowing, whether it had been the day before or whether a frost had fallen during the night.

Q. It might have been snowing when you left the house that morning?

A. It could have been, but I don't know.

Q. You just don't have any personal recollection on it? A. No.

Q. But as I understood you to say a moment ago, as you went into the General Store, you went out and around the icy condition that you observed extending from the mezzanine door entrance up to the entrance to the drug store, that's [74] shown under the drug store sign there in exhibit 12?

A. I came out of the store; I didn't go into the store; I came out of the store and went to the barber shop in another building. I came out of the store and around the condition to the barber shop.

Q. I misunderstood you. Whereabouts is the barber shop located?

A. It's just right across the alley from this building here.

Q. The barber shop is in another building other than the General Store Building?

A. The barber shop is right across the alley;

(Testimony of Thomas Hubbard.)

if this were the alley it would be right over here.

Q. You're designating what is marked as Columbine Avenue on Exhibit 7, as this alley?

A. Yes, that drive that's between what they call the recreation hall and the Coulee Dam store.

Q. Well, then I'd better get this straight. About how long were you in the Co-Op Store, the General Store, before you went to the barber shop?

A. I believe that I went—when I came to the store my main objective was getting to the barber shop, and there's a parking area on Fir Avenue here, and I usually park there, being in winter-time it's an easy get-away there, and go through the store, it's customary to go through the store and out the other door over here to this door to go to the [75] post office or any of those other places of business right in the building there.

Q. Well, let me just get this straight; you had left your home that morning, had you?

A. Yes, very shortly before 10 o'clock, or at 10 o'clock.

Q. And by the way, where did you live at that time?

A. 1009 Camas, where I live at the present time.

Q. And by the way, how far is that from Mrs. Phillips' house?

A. Oh, that's roughly, the way we go, a mile.

The Court: That street doesn't mean anything to me; is that in old Mason City?

A. It's all in old Mason City, yes.

(Testimony of Thomas Hubbard.)

The Court: On the same side of the river as this building? A. Yes.

Q. And then you came down and parked your car on this Fir Avenue?

A. Yes, the parking strip is right up next to the building.

Q. The General Store Building? A. Yes.

Q. Then you came into the General Store Building from some entrance on Fir Avenue?

A. Yes.

Q. And you just walked through the store?

A. I just walked through the store. [76]

Q. You had your little girl with you?

A. I had my little girl with me.

Q. And then as I understand it you came out of the entrance from the drug store, under the drug sign? A. Yes.

Q. As you're indicating in exhibit 12 here?

A. Yes.

Q. I suppose that only took you a few minutes?

A. A few minutes.

Q. And then as you came out you observed this icy condition which was on a little lower elevation, as you've indicated, going in a general westerly direction? A. Yes.

Q. And you and the little girl came out on the street, did you?

A. Yes. That was one of the few times there were no cars parked there, and we cut along the edge of the street and came back on down here at

(Testimony of Thomas Hubbard.)

approximately in front of Sears Roebuck or someplace in there.

Q. And that Sears Roebuck isn't shown in this exhibit 7?

A. Well, it would be in this space here.

Q. In any event, your purpose in going out into the street was to avoid this icy condition that you observed——

A. On that steeper incline.

Q. ——on that steeper incline, and particularly in front of the mezzanine entrance that led up to the beauty salon? [77]

A. Yes.

Q. And was it snowing then, do you recall?

A. No, it wasn't.

Q. Was there snow on the sidewalk in front of the spot where Mrs. Phillips fell?

A. Where Mrs. Phillips fell there wasn't any snow right at the point. Just toward the street, where it apparently is colder out there, or the drip from the building hadn't melted it, it seemed to me, as I recall, there was just a little dry fluffy snow there, a very small indication of snow.

Q. Do you recall, in fact, that it had begun snowing at 8 o'clock that morning and didn't stop until about 11?

A. Yes, I do.

Q. Well, this ridge that you've mentioned, whereabouts did that ridge go from the mezzanine door, that is, the entrance to the beauty shop, how long was that ridge in matter of feet?

A. I don't know, I didn't observe it, but I do remember that it extended on either side, and how

(Testimony of Thomas Hubbard.)

far either side of this mezzanine door I don't recall. You had a condition there that you seem to get more melting from the building on the west part of your building under the mezzanine than you do toward the east, under the general dry goods store. Anyway, out from under the mezzanine. [78]

Q. Just to orientate us with respect to this exhibit 7, can you give us, or did Mr. Benjamin give us, the directions? This Roosevelt Avenue is on the north, is it not?

A. It's on the north, and runs east and west.

Q. That's what I'm getting at. Now, this ridge that you've been talking about, did that run east and west of Roosevelt Avenue, in a general way?

A. Yes, generally it ran east and west, parallel with the eaves.

Q. And about how far from the mezzanine entrance was that ridge?

A. Well, I'm guessing, between 26 inches and three feet, approximately. The exact dimensions I can't give you, but that's an approximated distance.

Q. Oh, yes, you mentioned that some lady said that this morning, didn't you?

A. No; Mr. Benjamin. I heard Mr. Benjamin make that statement.

Q. Well, then, how long was the ridge, just an estimate?

A. I wouldn't know, I couldn't make an estimate, it being so long ago, but as I recall, it ex-

(Testimony of Thomas Hubbard.)

tended below, and more farther below than it did above the door.

Q. And about how wide was the ridge?

A. Well, you had an abrupt start where the water hit the sidewalk, then as the water ran out toward the street, or moved toward the street, it tapered off.

Q. Did you yourself personally actually witness any water drip [79] from any place at any time?

A. Yes.

Q. And whereabouts did you see the drip?

A. From the eaves. It wasn't a fast drip, however, it was very slow.

Q. And I believe you stated you don't know the exact spot that the plaintiff Mrs. Phillips fell, you just know where you saw her lying? A. Yes.

Q. Was she lying full length, was she?

A. Full length.

Q. Her head in the direction of the door?

A. Toward the east, parallel to the building.

Q. Oh, parallel to the building?

A. Parallel to the building. Her feet had slipped down here; anyway, that was the position she was in when I got there.

Q. And you mentioned something about her clothes being in a disarrange. What kind of clothes did she have on?

A. Well, she had a fur coat, and as I recall, for winter conditions, she had galoshes and a dark or black dress; dark dress; I couldn't say whether it was black.

(Testimony of Thomas Hubbard.)

Q. And she had her galoshes on? A. Yes.

Q. And did she have any parcels, or did you observed that?

A. I didn't observe that, no. [80]

Q. Did you notice any parcels around on the ice? A. No, I didn't.

Q. Any packages she might have been carrying?

A. None whatever.

Q. And this spot that you observed her lying on, I believe you stated that was a few feet out on the sidewalk from the entrance to the beauty shop? A. Yes.

Q. And I don't suppose you know just exactly, it might have been two or three or four feet?

A. It could have been anywhere, I will say, within two to five feet. It was within that distance.

Q. And let me ask you this: There isn't any question, is there, that you saw Mrs. Phillips come out of the entrance leading from the beauty salon?

A. No, I saw that.

Q. You saw her come out of the building at that entrance? A. At that entrance, yes.

Q. And at no other entrance in the General Store Building? A. No other entrance, no.

Q. And did I understand you correctly that not even the cars were parked around that area that you observed the icy condition and that you yourself avoided?

A. There were no cars parked there, that being that time of the day and weather conditions as they

(Testimony of Thomas Hubbard.)

were, people [81] apparently weren't out moving around.

Q. I see; it was really pretty bad weather conditions?

A. Yes, it was cold and disagreeable.

Q. And it had been snowing all day for several days, had it not? A. No.

Q. Do you recall that for a fact?

A. No, I don't.

Q. You haven't checked the weather conditions?

A. I haven't checked the weather conditions.

Q. You don't know whether it was or not?

A. No.

Mr. Kelley: That's all, thank you.

Redirect Examination

By Mr. Wolff:

Q. I believe I asked you if Mrs. Phillips could have gone around the icy spot as you did; didn't I ask you that? A. Yes.

Q. And could she have done so?

A. She couldn't have, and get out of the building.

Q. Isn't it a fact, Mr. Hubbard, that what you referred to as snow about 8 o'clock in the morning amounted to a frosty condition on the ice?

A. That's what I——

Mr. Kelley: That I assure you I would object, as leading and suggestive. [82]

The Court: I think it is. You can have him describe it.

(Testimony of Thomas Hubbard.)

Q. (By Mr. Wolff): Counsel has objected to that question, the way I have framed it, so I ask you now if you will describe as best you can just what this was that you were talking about as being snow at 8 o'clock in the morning.

A. Well, I think that he asked me about the snow and I told him that it was a snow-like condition. I don't know whether they call it snow or refer to it as snow, but anyway, it is a condition that we have at Coulee; it appears like snow, yet it is different than the average—than any of the snowfall that we have. It looks like snow upon the surface, yet it's really fluffy and dry, much different than any of our snowfall, ordinary snowfall that we have.

Q. Can you say how deep this fluffiness was on the ice at that point?

A. Just faint, just a small covering.

Mr. Wolff: That's all.

Recross-Examination

By Mr. Kelley:

Q. It wouldn't prevent Mrs. Phillips from seeing the icy condition, of course?

A. No, it wouldn't.

Q. And you observed it yourself, as you stated, with your little girl?

A. Yes, the entire area of the walk. [83]

Mr. Kelley: That's all.

Mr. Wolff: That's all, Mr. Hubbard.

Questions by the Court:

(Testimony of Thomas Hubbard.)

Q. This sidewalk is on the north side of the building?

A. North side of the building, your Honor.

Q. It would be shaded from the sun, then, at 11 o'clock in the morning?

A. I believe at that time of the year it would be shaded the entire day. There might be a few minutes in the morning, but I don't think so.

Q. Do you remember whether the ice was melting at that time, or was it below freezing?

A. It was below freezing at that time.

Q. There wasn't any melt or drip from the eaves at that time? A. No.

Mr. Wolff: I had understood you to say, Mr. Hubbard, that the icicles were dripping at that time? A. Well, I believe I misunderstood.

Q. (By the Court): I think he said he had seen them drip. A. Yes, the icicles.

Q. But not at that particular time.

A. Not at the time when Mrs. Phillips fell. I did observe the icicles. I wasn't following you there; I was thinking you meant under sun conditions.

Q. No, I think you followed me all right. What I was asking [84] you at that time was simply whether if you remember, it was thawing or freezing at that time.

A. Well, it was freezing, but the roof was melting.

Q. Oh, I see. That's a different proposition.

Mr. Wolff: In other words, even though the

(Testimony of Thomas Hubbard.)

weather was extremely cold out, drips were coming off that roof at the point where Mrs. Phillips fell, is that what you mean?

A. Yes, that's what I mean. I mean the weather conditions were such that it wasn't thawing elsewhere other than on that building.

The Court: That's all.

(Whereupon, there being no further questions, the witness was excused.)

THERA F. PHILLIPS

one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your name, please?

A. Thera Fisher Phillips.

Q. You're the plaintiff in this action, aren't you, Mrs. Phillips?

A. Yes, sir.

Q. Where do you live?

A. 600 Aspen, Coulee Dam. [85]

Q. Grand Coulee? A. No, Coluee Dam.

Q. How long have you lived there, Mrs. Phillips?

A. Approximately three years, at the present address.

Q. Have you lived in the Coulee Dam area for any period of time? A. Since 1947.

(Testimony of Thera F. Phillips.)

Q. What's your husband's occupation?

A. He's a representative of the Newport Shipbuilding and Drydocking Company, installing the water turbines at the dam.

Q. And has he been engaged in that work at the dam ever since you have lived there?

A. Yes, sir.

Q. Prior to the accident were you employed?

A. No, sir.

Q. You were a housewife? A. Yes, sir.

Q. What was the date upon which you allege you fell at Coulee Dam?

A. The 28th of January.

Q. Nineteen—— A. ——forty-nine.

Q. And were you living with your husband at the time? A. Yes, sir. [86]

Q. At the home you've indicated?

A. That's right.

Q. Do you have any children?

A. I have two.

Q. We have two?

A. We have two; I'm sorry.

Q. And how old are they, Mrs. Phillips?

A. Now, the older one, the eldest one, is 17; the youngest one is 16.

Q. So in January, 1949, they were two years younger?

A. That's right. The older one would have been 15, and the younger one 14.

Q. Calling your attention to the 28th of January, 1949, Mrs. Phillips, will you state what your

(Testimony of Thera F. Phillips.)

business was in the General Store Building on that day? Why did you go there to the General Store Building on that day?

Q. I was not in the downstairs of the General Store, I was upstairs.

Q. You were on the upper floor?

A. They make quite a difference in that.

Q. We've referred to that as the mezzanine, here. A. I was there, yes.

Q. And when did you go into the building on that date?

A. May I state that I went into the building, I had an appointment at 10, being late calling, I went in around half past [87] 10, quarter to 11; I had to come out of there and wait for another appointment, due to my lateness; came out of there approximately half past 11. I had gone there to have my hair rinsed for the night.

Q. You were late in making your appointment?

A. Yes, sir.

Q. And were you late in getting out for your appointment?

A. No, they got me out approximately almost on time.

Q. Were you due somewhere else?

A. Not until that evening, no, sir.

Q. Were you supposed to have been out of that appointment earlier to meet somebody?

A. I should have been there at 10, and I wasn't there until 10:30.

(Testimony of Thera F. Phillips.)

Q. You were only late in arriving for your appointment, then, not in leaving?

A. That is correct.

Q. Where were you going as you left the building? A. Home.

Q. For any particular purpose?

A. Yes, sir, that's where I live.

Q. Well, did you have any particular plans at home that you expected to take part in?

A. Not until that evening, no, sir.

Q. Well, what was your purpose, then, in going to the General [88] Store Building?

A. I went to have my hair rinsed. It was charter night for the Rotary Club, and I wanted to look a little presentable.

Q. Did you have your hair rinsed?

A. Yes, I did. ,

Q. Who took care of your hair?

A. Mrs. Dumas' operator, a Mrs. Ruth Thomas.

Q. In Mrs. Dumas' beauty shop on the second floor or what we call the mezzanine of the General Store Building? A. Yes, sir.

Q. Was Mrs. Dumas there herself?

A. Yes, sir.

Q. Do you know what places of business occupied the second floor of that building at that time?

A. I'm not at all certain as to all of them. I know some of them.

Q. Well, state the ones you know about.

A. There was the National Park Service, the beauty shop——

(Testimony of Thera F. Phillips.)

Q. The National Park Service of the Federal Government?

A. That is correct; the beauty shop, and that was all other than a hall in the back that was rented occasionally to organizations.

Q. As you went into this building you approached through the doorway we've discussed here as the entrance to the mezzanine? [89]

A. Yes, sir.

Q. That's a double door, isn't it?

A. Yes, sir.

Q. And just inside the door is there a landing?

A. Oh, mayhaps a couple of feet, just enough to stand inside the door. In inches I wouldn't know.

Q. Is there anything else in there except the stairway? A. No, sir.

Q. What was the condition of snow and ice just outside the doorway when you went in?

A. Terrific.

Q. Well, explain that.

A. It was in a terrible state.

Q. You tell us so that we will understand.

A. Where the water had dripped, apparently, from the roof it had frozen in a ridge; there had been icicles knocked off, they were imbedded in the ice, and it was dangerous. I was well aware of it, and very careful.

Q. Had the condition changed when you left the building? A. No, sir.

Q. It was the same as when you went in?

A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Was there any other way for you to leave the building than the one you did leave by?

A. No, sir. I didn't know of the fire escape. [90]

Q. Do you mind telling how much you weighed at that time? A. The same that I weigh now.

Q. How much is that? A. 240.

Q. And how old are you? A. I'm 46.

Q. So you were 44 at the time of the accident?

A. That's correct.

Q. What were you wearing for clothing at the time of the accident?

A. I don't understand that, directly.

Q. What clothing were you wearing?

A. You mean the regular clothes? I had my regular clothes, a dark dress, my fur coat, galoshes over low heeled shoes, and I had my hair tied up when the accident happened.

Q. Did you have any parcels or bundles?

A. No, I hadn't been in the store.

Q. Do you have the galoshes and the shoes here that you were wearing?

A. Yes, sir. The galoshes have been worn since.

(Whereupon, the galoshes were marked Plaintiff's Exhibits Nos. 18 and 18-A for identification.)

(Whereupon, the shoes were marked Plaintiff's Exhibits Nos. 19 and 19-A for identification.)

Q. (By Mr. Wolff): How long had you had the galoshes that you [91] were wearing, Mrs. Phillips?

(Testimony of Thera F. Phillips.)

A. They were purchased before Christmas of that year.

Q. Showing you plaintiff's exhibits 18 and 18-A, can you state what these are?

A. They're galoshes.

Q. Are they the overshoes you just mentioned you were wearing? A. Yes, sir.

Mr. Wolff: We move their admission into evidence.

Mr. Kelley: No objection.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 18 and 18-A for identification were admitted in evidence.)

Q. (By Mr. Wolff): Now, showing you plaintiff's exhibits 19 and 19-A, Mrs. Phillips, can you tell us what they are? A. They are my shoes.

Q. Are they the shoes you were wearing at the time you fell? A. Yes, sir.

Mr. Wolff: We move their reception into evidence.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 19 and 19-A for identification were admitted in evidence.)

Q. (By Mr. Wolff): Have the galoshes been worn since the accident?

A. Yes, sir, I wore them the following year, practically the whole—any time that I went out. [92]

(Testimony of Thera F. Phillips.)

Q. Will you describe to us as fully as you can just what happened from the time you left the entrance doorway until you fell?

A. From the time I left——

Q. That's a short span of time, but I want you to describe it as fully as you can.

A. From the entrance of the building to when I fell?

Q. That's right. Did you come out with your right foot or left foot?

A. I stopped at the foot of the stairs to tie up my hair, put my scarf on, looked at my watch to see if it was time for my daughter to come home from school, stepped on the sidewalk, and the next thing I knew I was on the sidewalk.

Q. Which foot gave 'way on you?

A. My right one.

Q. Is that the one that was injured?

A. Yes, sir.

Q. You say it was time for your daughter to be home from school?

A. I was looking to see if it was time.

Q. Was it? A. Not quite.

Q. How much time did you have?

A. I realized she was either just ahead of me, or had not left the building, and instead of waiting for her I started home. [93]

Q. State then your position as you lay on the ice after your fall.

A. I was flat on my back when I became conscious of where I was. I tried to get up, and I

(Testimony of Thera F. Phillips.)

couldn't, and I called for help. My clothes were up 'way above my waist, and it was most embarrassing. I was laying on the ice. My clothes being up it was very uncomfortable, it was mighty cold. When help finally came they put coats over me to keep me warm, but nothing under me.

Q. Who was the first person that came to you?

A. The first one I have any recollection of was Shirley Johnson holding my head.

Q. Were you suffering any pain at that time?

A. Intense.

Q. Just what was the pain, and what parts bothered you?

A. From my knee down I didn't feel as if I had any leg other than just a tremendous ache.

Q. All the way down from the knee?

A. Yes, sir.

Q. And did you suffer any other pain or suffering?

A. My head, when I bumped it on the sidewalk, but my leg overpowered that; it hurt so bad I didn't think I could possibly stand it.

Q. And your head was bumped when you fell?

A. Yes. [94]

Q. Your leg from the knee down?

A. It bothered; at the time I didn't know if it was my knee, my ankle, or what; it was just an intense pain.

Q. How long before anyone came to you?

A. In minutes, I don't know exactly. It wasn't too long.

(Testimony of Thera F. Phillips.)

Q. Did it seem long to you at that time?

A. It seemed ages.

Q. Did you see anyone in sight that you could call to?

A. No, only a woman that came out of the door, and she vanished. I don't know where she went. She ran when I called.

Q. Did you call her? A. I called.

Q. Did she come?

A. She didn't. She ran into the store.

Q. How did Shirley Johnson happen to come?

A. That I don't know, sir. School was out; she was going that way for the lunch hour.

Q. Do you know whether the icicles were dripping at that time?

A. I know it felt rather damp on the ice. I could have been pure cold.

Q. Your body was in direct contact with the ice?

A. Yes, sir.

Q. How much of your body?

A. From my hips half way down my thighs. [95]

Q. You were laying on your back?

A. Yes, sir.

Q. And who else arrived before you were removed from the ice, Mrs. Phillips?

A. There was a number of people. I couldn't say how many. People I had never seen before.

Q. Quite a crowd gathered around?

A. Yes, sir.

Q. Did their presence have any effect upon you?

A. They made me more uncomfortable by throw-

(Testimony of Thera F. Phillips.)

ing coats on top of me and just leaving me lay there on the ice.

Q. And did the fact that part of your body was uncovered in the presence of these people have any effect on you?

A. Well, naturally it was most embarrassing, and when I tried to pull down my dress they pushed me back on the ice and told me to lay still.

Q. Where were you taken when you were taken off the ice?

A. Into the Co-Op store, and laid on the floor.

Q. Do you know how long you were there?

A. I would judge ten or fifteen minutes, before the ambulance came.

Q. Did a doctor arrive? A. Two of them.

Q. Two doctors? A. Yes, sir. [96]

Q. Do you know their names?

A. Dr. Eugene Wiley and Dr. Dudley Wiley.

Q. And what, if anything, did they do when they arrived?

A. Dr. Eugene Wiley looked at my foot. I remember asking "It's broke, isn't it?" He said "I don't know what else." He and Dr. Dudley picked me up and put me on the stretcher. He removed the overshoe, but he couldn't get off the other shoe at that time.

Q. Did anyone assist them in picking you up?

A. Not that I know, sir. They may have. I was in such pain I don't remember.

Q. Who picked you up from the ice and took you inside?

(Testimony of Thera F. Phillips.)

A. I couldn't tell you their names.

Q. Did your removal from the ice into the building cause you any discomfort?

A. Well, yes, sir, it wasn't comfortable, and they left my feet dangle in the air from the knees down, and the pain was excruciating.

Q. State just what pain you suffered at that time, if any. A. The pain from my foot.

Q. An other pain?

A. Not that I was conscious of, no, sir.

Q. Did they give you anything before they moved you from the ice? A. No, sir. [97]

Q. To calm down your feelings or to help the pain? A. Not a thing, no, sir.

Q. When you were removed from the store onto the stretcher and into the ambulance were you given anything? A. No, sir.

Q. Did the movement of your leg or your foot, as you have indicated, they were left to dangle——

A. Not when the doctors picked me up.

Q. That wasn't permitted when the doctors picked you up?

A. Before, when I was picked from the sidewalk and carried into the building, yes. When the doctors picked me up, no.

Q. And where did you go from the floor of the Co-Op Store? A. To the hospital.

Q. The Coulee Dam hospital? A. Yes, sir.

Q. And what happened there?

A. Well, they took me into the X-ray room, X-

(Testimony of Thera F. Phillips.)

rayed my foot, took me then to the cast room and eventually set it, put on the cast.

Q. Were you given any——

A. I was given sodium penathol. It didn't put me to sleep. I was given four spinal injections before the leg could be set.

Q. About how long was it after the accident before you were given this sodium penathol? [98]

A. That was a little after 12. The noon whistle blew just as I went into the X-ray room.

Q. Do you know the time you fell?

A. Approximately 11:30. My watch said 11:26.

Q. And through the use of those drugs were you relieved temporarily of pain?

A. No, sir. I was made very ill.

Q. You were very ill, you say? A. Yes.

Q. Will you explain that?

A. I am allergic to all anesthetics, and unable to take them.

Q. Did you explain that to the doctor?

A. Yes, sir, and he did not give me morphine, due to that.

Q. So at that time the ankle was set?

A. Yes, sir.

Q. And what happened next?

A. I was put in the hospital room and kept there in bed two weeks.

Q. Were you given anything to help your pain and suffering during that two weeks?

A. Yes, sir, it was prescribed for me to take it.

Q. You did take something?

(Testimony of Thera F. Phillips.)

A. Yes, sir, something.

Q. And you were in the hospital then two weeks, you say? A. Two weeks, yes, sir. [99]

Q. How did you get along in the hospital during that two weeks' period? Did you rest easily?

A. Well, I thought I did, very easily, but from the reports evidently I didn't. They kept me under opiates of different sorts and I was not very rational.

Q. Did you find out later that you had done things that you didn't realize you were doing?

A. Yes, sir; most embarrassing.

Q. Who told you about those things?

A. The nurses, and friends who had called to see me.

Q. Do you know now what they were?

Mr. Kelley: I don't see the materiality of this, of course, if your Honor please.

Mr. Wolff: I think she's entitled to show what she went through as the result of this accident, unless it's admitted.

The Court: Well, I wonder if it wouldn't be hearsay, unless she remembers it?

Mr. Wolff: Oh, yes, I agree to that, unless she knows of her own knowledge some way.

The Witness: Would it be permissible to state an incident?

The Court: Well, I think she could tell the condition that she was in. I don't know—a person during the time they were unconscious, they wouldn't have pain and suffering, but I suppose the experi-

(Testimony of Thera F. Phillips.)

ence of being rendered [100] unconscious would be unpleasant. At any rate, she can tell from her own experience what she remembers.

A. Well, I was not unconscious the entire time, to my knowledge.

Q. (By Mr. Wolff): Tell your experience.

A. I was just dull and dazed. At the time, I had been made mother advisor of the Rainbow Girls. The worthy advisor would come to me for instructions. I would tell her one thing. My daughter would come in to verify it; I would tell her another. I was unconscious of contradicting myself. That is why I was being embarrassed.

Q. That was typical of the entire time in the hospital?

A. Yes, sir, and afterwards, while I was at home. I was in bed then five weeks at home.

Q. Did the doctors apply a cast to your foot?

A. Yes, sir.

Q. Can you describe the cast?

A. Well, it was a very clumsy, lumbering cast that reached to the knee. The toes, the very tips of the toes were out, and the rest of the foot was completely encased.

Q. Were you able to move your leg?

A. No, sir.

Q. Could you move it from the hip?

A. No, sir, I was instructed to leave it perfectly still, just wiggle the toes. [101]

Q. Were you in bed? A. Yes.

Q. Was your leg strapped up at all?

(Testimony of Thera F. Phillips.)

A. No, sir, it was raised on pillows from the hip.

Q. Were you able to leave the bed at all during the fifteen day period? A. No, sir.

Q. And when you went home, what was your condition as to your mobility and so on?

A. I was taken home in the ambulance, put into a hospital bed, and stayed in that bed five weeks. Twice I was removed from the bed and taken in the ambulance to the hospital during that time, and had a new cast put on, and then sent back and put in bed again.

Q. Did you have any difficulty in these removals back and forth?

A. They sent the internes or stewards down for me, and with the help of a friend and my husband they got me in and out of the ambulance.

Q. Was it comfortable for you, or not?

A. Very, very uncomfortable.

Q. State just what the discomfort was?

A. The Ambulance was very inadequate; it was cold; the stretcher I was put on was not very comfortable; there were several times at the hospital I was nearly dropped from it; [102] it made me very uneasy when they put me on the stretcher.

Q. You mean the people at the hospital nearly dropped you?

A. Yes, sir, they were young men, and I am heavy. It was very difficult for them.

Q. Did the leg bother you during those periods?

A. The leg from that time, the day it was hurt, has never stopped hurting.

(Testimony of Thera F. Phillips.)

Q. Was it any more pronounced?

A. I suppose so.

Q. Will you explain?

A. The pain at that time was intense. As I said before, when I would go in to have these casts put on it was most miserable, it was agonizing. When they put on the last one and sent me home they told me then that the leg wouldn't be too bad, but it has constantly hurt. I can't say that it's as bad as it was; I'm maybe getting used to it. It still aches.

Q. When was the second cast removed, Mrs. Phillips?

A. I couldn't give you the exact date. The first cast was removed about four weeks from the accident. It was two weeks, approximately, after that, ten days to two weeks that they removed the second one.

Q. Around seven weeks after the accident that the second cast was removed?

A. That would be about right. [103]

Q. And what was done with your foot or leg at that time, by the doctor?

A. X-rayed, and another cast put on.

Q. Put a third cast on? A. Yes, sir.

Q. And describe that cast as best you can.

A. It was just the same as the one they had on before.

Q. For size and weight? A. Yes, sir.

Q. Did they do anything to assist you to walk, by that time? A. No, sir.

(Testimony of Thera F. Phillips.)

Q. Did they ever use walking irons or anything like that?

A. They put a walking iron on the bottom of the cast and put me on crutches, with instructions not to bear any weight on the walking iron.

Q. So in addition to the third cast you were provided with an iron on your leg? A. Yes, sir.

Q. And how long did you have to handle that third cast and iron?

A. That didn't come off until approximately the middle of May.

Q. Of 1949? A. Yes.

Q. How many casts altogether have you had on that ankle?

A. Four or five, I don't remember which. Maybe more. I think [104] there were five.

Q. And it was the middle of May when all the casts and irons were removed?

A. Yes, and then a bandage was put on.

Q. Well, when you got rid of the cast were you able to walk by yourself? A. No, sir.

Q. State what your condition was then?

A. I was forced to use crutches, and I used crutches until late in the fall, then to a cane.

Q. When you left the crutches and started walking on the cane did you get along pretty well and comfortable? A. No, sir.

Q. State just what the condition was?

A. I would just totter; I would be very unsteady on my feet. I didn't fall, with the cane, but I have

(Testimony of Thera F. Phillips.)

tripped without it. I have fallen without my cane. I have tried to do without it.

Q. I see you have a cane here in Court today, Mrs. Phillips. A. Yes, sir.

Q. Why do you use it?

A. Well, if I don't I'm liable to fall. I have tried not to use it.

Q. Is it your feeling of insecurity without it that causes you to fall? [105]

A. Not only my feeling; I actually fall.

Q. Do you have any disability in that ankle at this time?

A. I can't move my ankle but very little.

Q. Would you exhibit to the Court what you can do with the ankle, or cannot do with the ankle?

A. Yes, sir.

Q. Please do that, either by standing or sitting, whatever way you think you can best show.

A. Well, do you want it on the floor, or up?

Q. You go ahead and show the Judge what you can do as to the condition of the ankle.

A. I can move it toward me, and down, that is about all I can get it down, and sideways, that is the limit of it. It's stiff on this side.

Q. Do you mean you have such pain when you try to move it?

A. I mean it is stiff; I cannot move it.

Q. Has there been any change in the size of the calves of your legs, Mrs. Phillips, since the accident? A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Will you exhibit to the Court any change there may be?

A. This leg I think you'll find through the calf is an inch, at least, smaller than the left leg.

Q. And is there any change, Mrs. Phillips, in the size of the ankle itself?

A. Approximately an inch and a half to two inches. At times, [106] more.

Q. Which leg is larger or smaller?

A. The right leg is the largest.

Q. It's swollen in through here?

A. Yes, sir.

Q. On the right side, just below the bump where the ankle would be? A. Yes, sir.

Q. Have you measured it, or had it measured?

A. Yes, sir.

Q. And you say the calf is one inch smaller?

A. Yes, sir.

Q. And the ankle is how much larger?

A. From an inch and a half to two inches.

Q. When was it you last checked those figures?

A. The exact date I do not know; it hasn't been too very long ago.

Q. Well, the last few days, or a month, or a year ago?

A. Oh, it's been the last month or so. The last three months, perhaps.

Q. And you feel that that's the condition now?

A. Yes, sir.

Q. Well, Mrs. Phillips, I believe you stated that

(Testimony of Thera F. Phillips.)

you were mother advisor to the Order of Rainbow Girls at that time?

A. That is correct, at that time, sir.

Q. Just state what such an organization is, briefly. [107]

A. It's an organization of young women from 13 to 20, who were under my supervision at that time.

Q. You were their supervisor?

A. That is correct, sir.

Q. Had you just been elected to that?

A. Yes, sir.

Q. When were you elected to that?

A. The beginning of January.

Q. 1949? A. Yes, sir.

Q. What effect did this accident have upon your carrying out the pleasures and the duties of that position?

A. I voluntarily resigned, and was rejected. It forced other members of the Rainbow Board to take over my duties and perform them for me, other than bookwork, until such time as I was able to go back. I went back, as I felt a duty to the young people there, with my leg in a cast, and on crutches.

Q. When did you go back to your duties with the Rainbow Girls?

A. It must have been about the end of March or the beginning of April meeting.

Q. 1949? A. 1949, yes.

Q. So you were out for about four months?

(Testimony of Thera F. Phillips.)

A. That is correct, sir. [108]

Q. Had you been connected with the Rainbow Girls for some time past?

A. No, sir, not as an adult. Other than the mother advisor and the advisory board, there are no additions connected with that.

Q. What other activities had you engaged in prior to your accident?

A. I was vice grand of the Rebecca Lodge in Grand Coulee; forced to resign due to the fact I couldn't climb the steps.

Q. What is the Rebecca?

A. Auxiliary of the Odd Fellows. I was at that time membership chairman of the League of Women Voters. I was Ways and Means Chairman and Program Chairman as well as musician of the Women of Rotary. I couldn't continue that.

Q. What is the vice grand of the Rebecca?

A. Next to the presiding officer.

Q. Were you able to go back to the Rebecca Lodge?

A. I have never been able to go back.

Q. Will you state the reason why?

A. I cannot climb the steps.

Q. Are they on the second floor? A. Yes.

Q. Of what?

A. The lodge hall in Grand Coulee. It's a long flight of [109] stairs.

Q. Did you participate in any church activities at the time of the accident?

A. I had at one time, yes, sir.

(Testimony of Thera F. Phillips.)

Q. Were you at the time of the accident?

A. No, sir, not at the time of the accident. I'm not able to sit in the church on those pews at this time. There's no place for my foot; I can't keep it on the floor the length of the service.

Q. What effect has your accident had upon your activities with the League of Women Voters?

A. I'm not able to attend.

Q. Why can't you?

A. They have them in homes, and most homes have steps that have to be climbed to get in and out. I have a dreadful time. I've had a hard time today. I'm unable to drive a car; I have to wait for someone to come for me.

Q. Did you drive a car before the accident?

A. 22 years, yes, sir.

Q. You and your husband had a car?

A. Yes, sir.

Q. And you drove it? A. That's correct.

Q. Did you participate in the Eastern Star organization?

A. Yes, sir, just committee and kitchen and things of that [110] sort that necessitated me being on my feet.

Q. Were you active in their activities?

A. Yes, sir; to that degree.

Q. What activities did you engage in?

A. The kitchen, the serving, and the cooking.

Q. And were you able to continue that?

A. No, sir.

Q. And why not?

(Testimony of Thera F. Phillips.)

A. I haven't been able to do it at home, either. I can't stand on my feet so long.

Q. I believe you referred to the Women of Rotary?
A. Yes, sir.

Q. You said you were program chairman?

A. Yes, sir.

Q. And musician?
A. Yes, sir.

Q. Do you still do those things?

A. No, sir.

Q. And why not?

A. It's too difficult to get around; I have no way of going and coming.

Q. What musical instrument did you play, or did you sing?

A. I did both; I played the piano and sang.

Q. And can't you play the piano now?

A. Only sitting sideways on a stool. If there's a bench it's [111] very uncomfortable. I cannot use the pedal on the right foot.

Q. Now, about the automobile, did you have any particular activities that you followed with the automobile before the accident? What was your routine with the car? Has it been changed at all?

A. Yes, sir. The car had always been at my disposal. It still is, but I can't use it. We bought a new car thinking perhaps I could drive it, using the opposite foot. It was impossible.

Q. It doesn't have a clutch pedal in it?

A. No, sir.

Q. You thought by using the wrong foot—

A. Yes, sir, but it's impossible.

(Testimony of Thera F. Phillips.)

Q. You must use the right foot, you find?

A. That is correct.

Q. Were you of any assistance to your husband with the automobile before the accident?

A. Well, he's always felt so.

Q. Will you tell us how?

A. Well, I've been able to take him to his work, in an emergency when he was needed at home, any phone calls from the plant, anything where they couldn't get through to him at his office I would go for him. I have taken him places where he needed to go; used my car as a taxi, [112] practically, for everyone in the community that needed to be hauled at one time, and felt I was at their disposal any time they needed me.

Q. Was it your husband's practice to take the car to work?

A. And when I needed the car I would take him in the car and go get him.

Q. Did I understand you to say you don't drive at all any more? A. No, sir.

Q. Has this automobile situation added at all to your expense of living? Has it any bearing upon that?

A. Well, it's necessitated buying a new car; we thought it was a necessity to buy that, to try it, anyway. The only expense incurred other than that would be taxicabs and things, where I would have to call those to take me where I would have to go when he was unable to be away from work and take me.

(Testimony of Thera F. Phillips.)

Q. So that's the way you get around now?

A. That is correct, and instead of taking the students in my car as I have before, I've had to charter busses.

Q. You've indicated that your movement of that ankle is quite limited? A. Yes, sir.

Q. Has it been improving?

A. No, sir. [113]

Q. How long has it been since there has been improvement?

A. It's been—there's been no improvement in it since in October, 1949. There was a series of manipulations on that ankle. From then there's been no other improvement. It was absolutely stiff before that time.

Q. After the Doctors Wiley at Coulee Dam treated your ankle did you make any other effort to procure medical aid? A. Yes, sir.

Q. State what you've done?

A. I was instructed to go to Dr. Adams.

Q. Who told you to go there?

A. Dr. Wiley; he was leaving the area of Coulee Dam.

Q. And did you go through any treatments with Dr. Adams? A. Yes, sir.

Q. State what.

A. Dr. Adams sent me to a physio-therapist. I went to her about two and a half weeks, no help, and he sent me to St. Lukes Hospital and performed what he called manipulations on my ankle. At that time the ankle moved just to the extent that it does

(Testimony of Thera F. Phillips.)

now. Since then there's been no improvement. He said that was all there could be done for it.

Q. Did he tell you you should come back?

A. No, sir, he said I did not have to come back. That was in November, following that treatment.

Q. And have you had any further [114] treatment? A. Not treatment, no, sir.

Q. Do you have any reason to believe that the condition of the ankle will improve from its present state? A. I can only hope so.

Q. I believe you indicated that you were a housewife and did most of the duties around the house?

A. Yes.

Q. Did you have any help from home before the accident? A. No, sir.

Q. You did all your own work?

A. Since I have been at Coulee Dam, yes, sir.

Q. Have you been able to do your ordinary housework since the accident? A. No, sir.

Q. State what limitations were placed upon you because of the accident.

A. Well, I'm not able to—I can't have waxed floors, I slip; it necessitates constant scrubbing, and very dusty. I have to depend on my daughters to do everything that's done except a wee bit of cooking and an occasional washing dishes.

Q. You keep your house now without waxed floors? A. Yes, sir.

Q. Do you have hardwood floors?

A. No, sir. [115]

Q. What kind of floors do you have?

(Testimony of Thera F. Phillips.)

A. Linoleum in the kitchen, and plain floors in the rest of the house.

Q. You used to have them waxed?

A. I had them all waxed, yes, sir.

Q. Who does the cooking now at your home?

A. I cook some, but most of it by my daughters.

Q. How long a period was there before you could cook, after the accident?

A. Well, up until now it's been very limited, and it's only been the last year I have been able to do anything of that sort.

Q. Have you had any hobbies, Mrs. Phillips, other than what you've indicated here?

A. Oh, yes.

Q. What were your hobbies?

A. Ceramics, crocheting, my music, reading, knitting, and my organizations.

Q. Did you do any hiking or fishing?

A. Oh, yes; I consider that almost a necessity, fishing, stream and lake, hiking, and dancing.

Q. What effect has this had upon those activities?

A. Well, we had joined the old-time dance club; it was the only dancing my husband would ever say he enjoyed. Since that time we haven't been able to go. I can't dance. I [116] never was much of a fisherman, or caught much, but I still persisted in going along. I tried to fish, and I really did enjoy it. I haven't been able to do any stream fishing since, it's too rough, I can't walk around, so we purchased a boat, and I can sit in a boat.

(Testimony of Thera F. Phillips.)

Q. You do that now, still fishing in a boat?

A. Still fishing and trolling.

Q. You've indicated in your complaint, Mrs. Phillips, that you were unable to do your family laundry until December, 1949?

A. Yes, sir.

Q. And that you were required to make expenditures to have the laundry done, amounting to \$30.12. What are the facts in that regard?

A. That amount that is stated there runs over a period of about the first year. However, I am still compelled to send out the heavy laundry.

Q. Did you actually spend some money to have this laundry done?

A. Oh, yes, sir; I send it to the laundry.

Q. What laundry did you send it to?

A. The Savaday, and Victory.

Q. And how much did you spend?

A. I think over the first year it was approximately \$30.00, until the end of that year. It may have been more or less. [117] The exact figure I do not know.

Q. You've alleged in your complaint that your daughter Thera had been earning money as a theater usherette, is that right?

A. Yes, sir.

Q. How much was she earning?

A. I think it was anywhere from \$3.50 to \$10.50 a week.

Q. You've alleged \$5.00?

A. Well, it would average approximately that.

Q. And how was her employment affected by your accident?

(Testimony of Thera F. Phillips.)

A. It necessitated her staying home and doing what she could about the home.

Q. Did she continue to earn \$5.00 a week then?

A. No, sir.

Q. You've alleged you've spent \$19.95 in long distance telephone bills, making calls relating to your medical care and hospitalization. Can you set forth with particularity just what those were and what the need for them was?

A. The first one was to notify my parents. There are two listed for Spokane, that necessitated making trips to the doctors and hospitals, I suppose. That's the only thing I've called Spokane for. The one to Tekoa was to cancel an engagement. The one to Memphis, these to Spokane were all doctors, and to Miss Bennett, the nurse.

Q. Now, Mrs. Phillips, you have indicated that while you were [118] confined to bed you spent \$6.00 to have a telephone extension installed?

A. That is correct.

Q. What was the purpose of that extension?

A. I was compelled to stay in the house by myself at Coulee Dam, there's no help available, there was no one to stay with me all day; my husband had to be at the powerhouse; my children had to be in school, so we had an extension put in the living room right by my bed, in case of an emergency. We had to keep the fires on; it was a little dangerous with the bed clothing around those heaters.

Q. You've indicated you spent \$57.08 for drugs, medical supplies, and cane, and on this document

(Testimony of Thera F. Phillips.)

marked plaintiff's identification number 1 we find a list totaling \$55.52. Will you explain to the Court the need for those items? A. In detail?

Q. Yes, you'd better.

A. In February, the syringe that was on the top, listed, was used on my ear, due to the fact from these ice bruises they seemed to cause congestion, and it was under the doctor's order. The RX were all drugs given me; there's B.C. powder and aspirin, the witch hazel was used to wash and cool my leg.

Q. In connection with the use of a cast?

A. Yes, sir. [119]

Q. Did you explain the B. C. Powder? There was some question about that. What is a B. C. powder?

A. It's a headache powder, used the same as aspirin or anacin. I have one there on the table; used to alleviate pain.

(Short recess.)

Q. You've alleged, Mrs. Phillips, in your complaint that you were required to travel from your home in Coulee Dam to the city of Spokane for medical care and hospitalization on nine different occasions? A. Yes, sir.

Q. At \$5.41 per round trip by bus. Will you state what need existed for these trips?

A. The first trip was to see Dr. Adams, on Dr. Wiley's recommendation. The next trip was to see—and at that time he had me go to see Miss Bennett, physio-therapist, and make arrangements with

(Testimony of Thera F. Phillips.)

her for treatments. The next trip was when I came in and stayed at the hotel for an entire week, with treatments each day. Being unable to obtain a room in Spokane the following week due to these conventions, and the loggers and miners or whatever it was taking up all the rooms, I traveled to Spokane and back each day for seven days, and then I went home on Tuesday, I think it was, and on Sunday was returned to St. Lukes Hospital and came in by bus, since it was not convenient for Mr. Phillips to bring me in. [120]

Q. Had the doctor recommended you take these treatments?

A. Yes, sir, it was under doctor's orders that I took them.

Q. You've alleged you spent \$36.09 in that your clothing you were wearing was damaged to that extent. Can you state what items made up that amount, and what the need was?

A. The dress I had on was ripped and torn under the arms from the strain of the fall. My knee went through my new fur coat, sliding through the ice, took all the hair and fuzz off the back of the coat; my slip was torn, and in actual dollars and cents it may have been more than that.

Q. You know that you spent at least \$36.09?

A. I know I have spent that, yes, sir.

Q. You've alleged you spent \$34.44 because you were unable to wear the high heeled shoes you had before the injury and had to replace them with

(Testimony of Thera F. Phillips.)

low heeled shoes. What were the facts in that regard?

A. Before I was hurt my dress shoes all had what was known as a Cuban heel, a dress heel. I am not able to wear those, and I sold the shoes I had, but it necessitated buying I think four pairs at one time so I could change my shoes. I have to change my shoes several times a day.

Q. How much did you have to pay for shoes?

A. Anywhere from \$7.95 to \$11.95 a pair.

Q. You actually bought some shoes?

A. I bought four pairs; that was the account for three pairs [121] that I purchased at one time.

Q. You've alleged that you spent \$706.56 for hospitalization for a total of 19 days, and required the use of laboratories, operating rooms, and x-ray equipment, and required medical, surgical, and therapeutic treatment, as well as x-rays outside the hospital. The defendants have admitted you paid that money, Mrs. Phillips, but you must prove that all of these things were necessary and flowed from this injury. I want to show you papers marked here for identification as plaintiff's identification number 2. Will you state whether the items shown there refer to the last allegation that we just discussed?

A. Due to my ankle.

Q. Yes, is that correct, is that what's shown in that paper?

A. Yes.

Q. Will you explain what the items there are?

A. In detail, each one?

Q. Yes, why they're related to this accident.

(Testimony of Thera F. Phillips.)

A. Well, the cast, the cast room, and the materials to put on a cast was \$10.00, and the ambulance to carry me to and from the hospital was \$10.00. That is correct.

Q. Is that what you paid? A. Yes, sir.

Q. All right.

A. Here's cast room and cast materials, \$10.00. That is [122] correct. This bill states room service for 11 days at \$10.00 a day, that is correct.

Q. Where was that?

A. At the hospital at Coulee Dam. Ward service, 4 days at \$8.75, that's correct. My cast, the use of the materials, the spinals, the ambulance, that's all correct, sir.

Q. Those all relate to the treatment you've related to the Court earlier?

A. To my ankle, yes, sir. This is another cast.

Mr. Wolff: I probably should move the admission in evidence of each of these as we go along; there are several of them.

The Clerk: Your pre-trial orders covers them as one exhibit.

Mr. Wolff: Then we'll move their admission.

Q. (By Mr. Wolff): And referring next to the papers marked 3, will you state what need existed for the payment of that money?

A. That was paid to Dr. Adams on receipt of his statement to me when I came from St. Lukes Hospital, \$106.00. This is an office call to Dr. Adams, \$10.00. This \$45.50, the Columbia Clinic.

Q. That's the Coulee Dam Hospital?

(Testimony of Thera F. Phillips.)

A. Yes, sir; one for \$134.50, Coulee Dam. One for \$6.00, that was when I was in the hospital for opiates, I think that [123] \$6.00 was a special treatment of opiates for pain. The one for \$28.00 is another one from there, and \$15.00 is another one. These are all from the hospital and Dr. Adams.

Q. And they relate to the circumstances you previously related to the Court?

A. Yes, sir.

Q. Now, showing you the paper marked plaintiff's 4, will you state what need existed for those payments?

A. This \$5.00 was a check that I paid to Miss Bennett, the physio-therapist. One for \$3.00, for treatment; one for \$9.00, that was three treatments, and another one for \$6.00, which was two treatments. This was during the time I came back and forth on the bus and stayed in town.

Q. Now, showing you the paper marked plaintiff's identification 5, why did you pay \$15.00 on that check?

A. This was Dr. Adams' idea; he had a Dr. Small, the anesthesiologist, come up to administer the sodium penathol.

Q. So you paid that separately? A. Yes.

Mr. Kelley: May I see that, please?

Mr. Wolff: I move the introduction in evidence of all the exhibits. How do you identify them?

The Clerk: There's plaintiff's 1, 2, 3, 4, 5, 6 is the clothing bill, I think you've already identified that, and the telephone toll is number 11. [124]

(Testimony of Thera F. Phillips.)

The Court: If you'll look at the pre-trial order, you'll find them listed there, 1 drugs, 2 hospital, 3 doctor, and so on.

Mr. Kelley: They'll have the same numbers here, your Honor?

The Court: Yes.

Mr. Wolff: Have you seen these, Mr. Kelley?

Mr. Kelley: I don't want to see any of those; I'm just looking at this.

The Court: Well, I think I'll admit them in evidence, and then if counsel has objection to any particular items as not being proper, I'll hear them.

Q. (By Mr. Wolff): Did I ask you, Mrs. Phillips, if you knew how long the walk was in its condition——

A. No, sir.

Q. ——before the accident?

A. No, sir, I do not. I had not been up to that place in about a week.

Q. This injury to your ankle, did it relate to the bones of the joint, or to other bones in the ankle?

A. Directly in the joint.

Q. And where is the pain in the ankle now, if any?

A. Right beside the ankle bone, on the outside of the foot.

Q. Does the pain relate to the joint itself, or not?

A. It's hard to differentiate between that. It is sore to [125] the touch, the right ankle.

(Testimony of Thera F. Phillips.)

Q. Does it make any difference when you put your entire weight on it?

A. Well, it feels as if it will not hold me up, then.

Q. What about the pain aspect?

A. It aches just like a toothache.

Q. Does your weight have any effect on the pain?

A. I don't think so. It aches when I'm on it, it aches when I'm off it.

Q. Have you had a complete recovery of the injury to your head?

A. I think so. It hasn't bothered since.

Q. The only permanent disability that you complain about is in the ankle?

A. That is correct.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelley:

Q. About how long, Mrs. Phillips, were you under Dr. Adams' care?

A. I saw Dr. Adams first in July. It was an examination.

Q. July of 1949?

A. 1950—no, that would be 1949; I'm sorry. It was the same year. I went back to Dr. Adams in October—no, in September, after school opened. He asked me to come in for another examination. October, I think it was October 2, [126] he sent me to St. Lukes. I was there until October 6. In

(Testimony of Thera F. Phillips.)

November, around the middle of the month, I had to come in to Spokane, that was a trip on the bus, to have him remove bandages, and that is all.

Q. As I understand it, Dr. Adams was your physician who last attended you for your ankle?

A. It was the last one that I went to on my own, yes, sir.

Q. And when did Dr. Adams discharge you?

A. I think about November 15th or 18th, around the middle of the month.

Q. Of 1949? A. Yes, sir.

Q. And as I understand it, that was the only medical treatment that you have had, that is, with respect to your right ankle, is that it?

A. Yes, sir.

Q. Well, maybe I misunderstood you. I thought there was some reference a moment ago to some head injury. You didn't have any medical treatment for any head injury?

A. Only in the hospital. I had several hypodermics to relieve the pain, and I seemed to recover.

Q. That was immediately after the accident?

A. Yes, sir, while I was in the hospital.

Q. Going back to the time of the accident, as I understand it you had lived in Coulee Dam a couple of years before the [127] accident?

A. That is correct.

Q. Had you been there the two preceding winters? A. Yes, sir.

(Testimony of Thera F. Phillips.)

Q. Do you remember when you first came to Coulee?

A. In February, 1942, and I was there for fifteen months, then I returned to the east coast, and came back in 1947, in February.

Q. And with reference to your sojourn in Coulee commencing February, 1942, for fifteen months, and then your subsequent sojourn commencing in February of 1947, for several years, at least as far as your experience went, this winter of 1949, was the first real cold weather that you experienced in Coulee Dam?

A. No, sir. 1944, I nearly froze to death.

Q. Oh, is that right? Were you there in 1944?

A. From 1942 to 1943—it was around 1942 to 1943, the first year I was in Coulee Dam, is the year I minded the cold more than I had in '49, when this happened.

Q. Well, do you know or don't you whether this winter of 1949, had the greatest snowfall, at least since you were there?

Mr. Wolff: I'll object to that as not the best evidence of what winter had the biggest snowfall. The weather records would show that.

Mr. Kelley: Perhaps counsel didn't hear me say, [128] while she was there.

Mr. Wolff: Same objection.

The Court: Well, overruled, as far as she remembers or knows.

A. As far as I can remember, 1948 was a severe winter as well as 1949. There was a tremendous

(Testimony of Thera F. Phillips.)

amount of snow in 1948, too. I wouldn't say '49 was any colder.

Q. (By Mr. Kelley): All right, is it your recollection that in '49, and particularly in January of 1949, and more particularly for the several days prior to your fall on January 28th of 1949, it snowed all through the day?

A. Did you say prior to the 28th?

Mr. Kelley: Would you read her the question, please?

The Court: Do you understand the question?

A. No, I do not.

(Pending question read by the reporter.)

Mr. Wolff: I don't think that question is specific.

A. I don't see how I can answer that.

Mr. Wolff: It probably should be broken down into several parts.

The Court: Well, you can answer it as best you can.

A. The only way I can answer that intelligently, I think, would be to say that it had snowed several days at different times, but the exact dates I don't recall.

Q. Yes; well, I just meant the two days before your fall. You [129] remember that, at least, don't you?

A. It may have snowed some, but not to any great extent. There had been snow on the ground for a month, maybe more.

(Testimony of Thera F. Phillips.)

Q. Well, going to the day of January 28, 1949, Mrs. Phillips, there isn't any question in your mind, is there, that it started snowing about 8:00 o'clock in the morning and continued up until just about the time you fell on the sidewalk, is there?

A. Yes, there's no doubt in my mind that it did not snow that morning. It was very cloudy; it was overcast; as one of the witnesses stated, there has been this mist in the air that freezes; it has the appearance of snow, but it's a frozen frost. We have that every morning in the winter.

Q. Well, let me ask you, on the morning of your accident was there this mist in the air that had the appearance of snow, and did that natural phenomena occur about 8:00 o'clock and continue until about the time you fell?

A. It didn't continue until the time I fell, if it came down at all, due to the fact I did not look out the window at 8:00 o'clock; I had not been out until after 10:00 o'clock; there was none in evidence then.

Q. Whereabouts is your home——

A. Within two blocks.

Q. ——with reference to this beauty salon in the General Store Building? [130]

A. About two blocks.

Q. And which way?

A. What do you mean, which way?

Q. Was it east or west?

A. Oh, it's one block east and one block south.

Q. As I understood you to say in response to

(Testimony of Thera F. Phillips.)

your counsel's questioning before the recess, you weren't in the General Store at all that morning?

A. No, sir.

Q. But you did your shopping at that General Store? A. No, sir.

Q. Well, whereabouts did you do yours?

A. I do my shopping in the store in Electric City, sir.

Q. I see; so you hadn't been over to the General Store for at least how long before your fall?

A. I haven't been in that General Store since I had returned to Coulee Dam. I never have traded in the store, in the grocery store. I have been into the department store at various times, but not since 'way before Christmas.

Q. Well, there isn't any question, is there, though, that you had this appointment at the beauty salon as you've indicated, for 10:00 o'clock that morning?

A. That is correct; I had a standing appointment at the beauty shop.

Q. And I suppose—I beg your pardon; a standing appointment? [131]

A. A standing appointment. I went once or twice each week, usually twice, and I hadn't been up that week.

Q. You hadn't been out that week?

A. No, sir.

Q. Had you observed the condition of the sidewalk when you had been out the previous week?

A. Well, to remember, no. It's always been in

(Testimony of Thera F. Phillips.)

rather bad condition; there's always snow and ice accumulating there, but at this time it was ice.

Q. I see, and you left your home approximately two blocks from the beauty salon on the morning that you fell, on foot, did you? A. Yes, sir.

Q. And what direction did you take to get to the beauty salon?

A. One block west, or one block east, one block south, and across the sidewalk and upstairs.

Q. Well, did you walk up this sidewalk in front of the General Store Building as far as it led up to the mezzanine entrance?

A. I might be able to show you here, sir.

Q. Yes.

A. When I came in onto the sidewalk, approximately here.

Q. Just show the Court how you came in.

A. Approximately here. It was so bad I took the edge of the [132] sidewalk.

Q. And by "here," you're referring to this Columbine Avenue?

A. No, I'm up on Roosevelt. It's the door to the mezzanine floor, the post office, and the bank. I came in right here; there's a Western Union here. I came in here and turned and went this way, and it was so bad along the building I walked on the edge of the curb until I got here.

Q. You say you came at the northwest corner of the building? A. Yes, sir.

Q. And then you observed the condition of the

(Testimony of Thera F. Phillips.)

sidewalk as it goes in a general easterly direction on Roosevelt Avenue? A. Yes, sir.

Q. And what about that condition?

A. Well, at the time, it was just rough ice. There was no snow in evidence; it was ice. The snow was on the edge of the curb.

Q. How about this mist that looks like snow?

A. If there was any there it must have blown off. There was none that I could notice.

Q. Was this sidewalk from the northwest corner of the building as I'm indicating on exhibit 7, up to the entrance to the mezzanine door, in which you went in, was that a glare of ice, solid ice?

A. It was rough.

Q. It was rough? [133] A. Rough ice.

Q. And did you walk up that sidewalk?

A. I walked on the edge of the street, out here where it would be the curb.

Q. Did you walk in the curb or on the sidewalk?

A. You couldn't walk on the curb, there was too much snow and ice piled along there. I walked right along there as near as I could until I got to the door.

Q. When you say "there," did you walk on the sidewalk? That's all I want to know.

A. Yes, sir, it was the only place I could walk.

Q. You walked on the sidewalk until you got to the beauty salon door?

A. I got up over it, yes.

Q. Was anybody with you at that time?

A. No, sir.

(Testimony of Thera F. Phillips.)

Q. And that time was about, as you've testified, 10:30 or a quarter of 11:00?

A. It must have been approximately 10:30.

Q. And as I understand it, you were about half an hour late for your appointment, is that it?

A. I had to call about it, yes, sir.

Q. And did you experience any difficulty as you walked up the sidewalk there to go into the beauty salon?

A. It was very difficult to keep my feet under me. It was [134] very slick.

Q. And as you described it, the snow and ice was terrific? A. Yes, sir.

Q. And it in your opinion was very dangerous, and you were well aware of it?

A. That is correct, sir.

Q. But you had to get to the beauty salon to have your hair arranged as you indicated for us, because you were going to some function of the Rotary Club?

A. That is correct; it wasn't just "some function"; it was the charter night. An ordinary meeting I wouldn't have gone to it. I don't know whether it means anything to you or not, but ordinarily I wouldn't have attempted it.

Q. Well, Mrs. Phillips, you went on up the stairs to your appointment at the beauty salon?

A. Yes, sir.

Q. And while you were there at the beauty salon you discussed the condition of the sidewalk with

(Testimony of Thera F. Phillips.)

this Mrs. Bessie Dumas, who ran the beauty salon, did you not? A. Yes, sir.

Q. And you told her in brief how icy it was all over and how hard it was to walk in front of the sidewalk in front of her entrance there?

A. We agreed on it, sir.

Q. I mean you did tell her that? [135]

A. Yes, sir.

Q. In fact, during that severe winter that was a favorite subject to talk about, wasn't it?

A. I wouldn't know; I hadn't been out to discuss it before.

Q. As I understood your testimony you came down from the beauty salon about 11:30, was it, or so?

A. Yes, sir; when I looked at my watch it said 11:26.

Q. Oh, yes, and I believe you said you stopped at the entrance and looked at your watch to see if it was time for your daughter to come from school?

A. That is right.

Q. And whereabouts was the school?

A. That's approximately a block east, and maybe a quarter of a block north.

Q. Of the General Store?

A. Of the General Store, yes, sir.

Q. And which daughter was coming from school?

A. Both of them—one of them, I'm sorry, the older one. The younger one was not in high school. I'm sorry.

Q. What time do they get out?

(Testimony of Thera F. Phillips.)

A. About 20 minutes or 25 minutes, I think it is, after 11:00.

Q. And I presume you wanted to, as you stated before the recess, get home?

A. No, I was going to walk down the street with her.

Q. Going to walk in what direction? [136]

A. That would have been one block north, one block west.

Q. Well, in any event you wanted to get home and prepare lunch, I assume?

A. Lunch was prepared before I left.

Q. Were you anxious to meet her at the school building and walk home with her?

A. Not particularly, no, sir. I had no intentions of going to the school building. She would have to pass where I was to go home, and I had planned if she would be coming from the school building that I would just walk down the street with her.

Q. But instead, as you came out of the entrance to the beauty salon you fell?

A. Just as I stepped out onto the ice, yes, a couple of steps.

Q. I don't suppose you know what caused your fall?

A. I would be willing to take my oath that it was that slick ice.

Q. Well, did you stumble, or what was the way you came down?

A. No, sir, I have never been a person to stumble.

(Testimony of Thera F. Phillips.)

Q. I see, you simply felt your feet go out from under you without touching any object, is that it?

A. The first thing I knew my right foot went out, that I was stepping on, and I was down.

Q. And as you've indicated, you were in great pain as you were on the sidewalk? [137]

A. Yes, sir.

Q. I don't suppose you took particular account of your surroundings at that time?

A. I don't quite understand you.

Mr. Kelley: Will you read that question?

(Pending question read by the reporter.)

A. Meaning what? My surroundings at that time?

Q. Where you were sitting on the sidewalk; I don't suppose you noticed the——

A. Well, I was laying on the sidewalk. I couldn't think of anything except the pain in my foot.

Q. Well, that's what I thought, yes. By the way, you had been in and out of that doorway as you've indicated at least once or twice a week for your standing appointment at the beauty salon, for several months prior to your fall January 28, 1949, had you not?

A. Approximately a year or a year and a quarter, yes, sir.

Q. So you were very familiar with the entrance?

A. Yes, sir.

Q. Now then, the exact spot of the accident,

(Testimony of Thera F. Phillips.)

Mrs. Phillips, would be a couple of feet out on the sidewalk from the entrance here that's labeled "doorway to mezzanine" as shown on exhibit 12?

A. You mean the exact spot I fell?

Q. Yes, as near as you could recall. [138]

A. As near as I could recall, I came out of the side here, of the swinging doors, that would be on my left, and the second step I fell down, and instead of laying on one spot, it was so icy I slid, may have slid as much as a foot and a half.

Q. Slid in a westerly direction down Roosevelt?

A. That's right, that's when my clothes went up so high.

Q. But what I was getting at was, where you slipped was only a couple of feet out from the building?

A. Just where that drippage came.

Q. That would only be a couple of feet, would it not?

A. I think maybe two and a half, something of that sort. I couldn't tell you exactly. I don't know.

Q. During the two winters immediately preceding your fall you had been in the beauty salon there, I take it, many times?

A. Yes, sir.

Q. Probably an average of twice a week, as you've indicated?

A. Once or twice a week.

Q. These galoshes that are in evidence here, plaintiff's 18 and 18-A, I think you said you had bought them the prior Christmas, is that it?

A. Just before Christmas, yes, sir.

Q. I suppose you had worn them from then until the time of the accident? [139]

(Testimony of Thera F. Phillips.)

A. That is correct, sir.

Q. Where did you get them, by the way?

A. I couldn't recall.

Q. I beg your pardon?

A. I couldn't recall. It must have been by a catalog. I don't know whether it was Sears or Montgomery Ward.

Q. Did you get them in Coulee Dam?

A. No, sir. I may have bought them in Spokane. I don't remember.

Q. And after Dr. Adams discharged you, November, 1949, from further treatment, did you take any other treatment after that?

A. No, sir, when he told me that that was all he could do for me I rested on his decision. I understood he was a very reputable man.

Mr. Wolff: What was that last?

A. I understood he was very reputable, very reliable, and I took his word for it and had no further treatment.

Q. (By Mr. Kelley): And no further physiotherapy?

A. No, sir.

Mr. Kelley: I think that's all.

Mr. Wolff: I have no further questions of Mrs. Phillips.

(Whereupon, there being no further questions, the witness was excused.) [140]

SHIRLEY JOHNSON

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your name, please?

A. Shirley Johnson.

Q. Where do you live, Miss Johnson?

A. Coulee Dam.

Q. Do you go to high school there?

A. Yes.

Q. What year are you in high school?

A. Junior.

Q. You know Mrs. Phillips, who just testified?

You want to give your answer audibly so they can write it down? A. Yes.

Q. I want to call your attention to the 28th of January, 1949. Do you recall seeing Mrs. Phillips fall at that time? A. Yes, I do.

Q. That was in front of the General Store Building at Coulee Dam?

A. It was in front of the beauty parlor door.

Q. In front of the door on the sidewalk, downstairs? A. Yes, sir.

Q. Where were you when you saw her fall?

A. I was coming down the sidewalk. I was right in front of the store there, in front of the door that goes to the [141] store.

Q. You were in front of what?

A. The door.

Q. That goes into what?

(Testimony of Shirley Johnson.)

A. The grocery store.

Q. Is that called the Co-Op store? A. Yes.

Q. That's in the same building? A. Yes.

Q. So you were a few feet up the sidewalk from where Mrs. Phillips fell? A. Yes.

Q. Were you watching her before she fell?

A. Well, I think I remember her coming down and taking a step and falling.

Q. You feel you saw her place her foot and then fall? A. Yes, sir.

Q. Do you know what she placed her foot on as she fell? A. Sidewalk.

Q. Was it a clean sidewalk, or otherwise?

A. What do you mean, was it icy?

Q. Yes, that's what I want to know.

A. Yes, it was.

Q. It was icy? A. Yes. [142]

Q. Do you know which foot she was placing her weight upon as she fell? A. No, sir.

Q. Did you see her go down? A. Yes, sir.

Q. Did you have occasion to examine the condition of the walk at that point?

A. All I know, it was awful icy and slick.

Q. Can you tell the Court what the condition of that ice was, whether it was smooth or rough or just what you saw there?

A. It was rough and slick.

Q. Describe it as best you can and just as fully as you can.

A. That's all I can say is it was slick and rough.

Q. It was slick and rough? A. Yes.

(Testimony of Shirley Johnson.)

Q. Was it even, or was it bumpy?

A. It was bumpy, I think.

Q. And how big was the bump?

A. I don't know.

Q. Well, do you think it was a six-inch bump, or a——

Mr. Kelley: Just a moment. If your Honor pleases, she can describe what she saw there.

Mr. Wolff: I think she can be considered as a witness that doesn't fully understand——

The Court: I think you may let her describe it. [143]

Q. (By Mr. Wolff): You describe it as best you can.

A. Well, there was snow on there, it was icy, and it was just like this—I don't know.

Q. You are indicating with your hands a wavy condition?

A. It was rough, you know. I don't know how to explain it any better.

Q. Do you know what caused the rough condition? A. No, sir.

Q. Do you know whether the icicles were dripping at the time?

Mr. Kelley: Just a moment; if your Honor pleases, I submit that she can describe what she saw.

The Court: I'll overrule the objection, whether the icicles were dripping.

A. Yes, I guess, I think they were at that time.

Q. (By Mr. Wolff): And do you know where

(Testimony of Shirley Johnson.)

the drips were falling in relation to this doorway that you mentioned?

A. They were falling on the sidewalk.

Q. Do you know how far out on the sidewalk from the door? A. No, sir.

Q. Can you state whether or not they were falling at the point upon which Mrs. Phillips stepped and fell? A. I believe so.

Q. Do you know how far out from the doorway Mrs. Phillips did fall?

A. Well, it was just a step, I'm sure. It might have been [144] more than a step, because there's a little door, you know, sort of a—and you have to take a step to step out, and then you're on the sidewalk.

Q. About a step or so out from there; and do you know how long that bumpy rough condition of the ice had existed prior to this time?

A. No, sir.

Q. Do you know whether it was that way the day before? A. No, sir.

Q. Did Mrs. Phillips say anything as she fell?

A. I can't remember if she said anything as she fell, but after she fell she hollered out in pain, I guess.

Q. What did she say, if you remember?

A. Well, she said to help her, she was hurt, and her ankle was hurting her.

Q. Did she say anything else?

A. Well, we started putting the coats over her. She said "I'm not cold" and she says "I'm cold

(Testimony of Shirley Johnson.)

where the ice is on me." She was on her back, I guess.

Q. Do you know whether the ice was in direct contact with her body? A. No, sir.

Q. You don't know?

A. Can't remember that.

Q. Do you remember whether her clothes were disarranged or not? [145]

A. I think they were; when we put the coats over her we straightened them out, I think.

Q. Who else came upon the scene as you did, if any other?

A. Well, before I got there there was another girl there.

Q. Do you know who she was?

A. I don't know for sure, but I think she was—she's married now; I don't know her name now.

Q. What was her name before, if you know?

A. Eileen Simpson, I think that was her, and she ran down, and when I got there she left, and Virginia Sjoberg was with me, and after we got there Nino Albert and two other guys came up.

Q. Do you know how long Mrs. Phillips lay on this ice before she was moved?

A. Well, it was quite a long time, because we didn't know what to do. It was a good ten minutes, at least.

Q. And was anything put under her during that period of time? A. I don't believe so.

Q. Where was she taken when she was moved from there? A. In the store.

(Testimony of Shirley Johnson.)

Q. In the Co-Op Store? A. Yes.

Q. And do you know how long she lay there before she was moved?

A. Well, I think it was about ten minutes. [146]

Q. Do you know where she lay in the Co-Op Store? A. Yes, sir.

Q. Where? A. In the grocery store.

Q. Was it on a table, bench, floor, a chair?

A. Floor.

Q. Do you know how long after the accident this rough condition of the ice continued?

A. No, sir.

Mr. Wolff: You may inquire of Miss Johnson.

Cross-Examination

By Mr. Kelley:

Q. Whereabouts did you live at the time of the fall, Miss Johnson? A. Where did I live?

Q. In Coulee Dam?

A. I lived up in the townsite.

Q. I beg your pardon?

A. Up in the townsite.

The Court: You'll have to keep your voice up. Do you know some of the girls back here? Just imagine you're talking to them when you answer the questions.

Q. (By Mr. Kelley): How far is the townsite, Miss Johnson, from the General Store?

A. It's about a mile.

Q. And by the way, how old are you, Miss Johnson? [147] A. 16.

(Testimony of Shirley Johnson.)

Q. And at that time whereabouts were you going to school? A. In the high school.

Q. And whereabouts is the high school?

A. Right above the store.

Q. Only a matter of a block or two?

A. I don't even believe it's a block.

Q. Whereabouts were you when you saw the plaintiff, Mrs. Phillips, fall?

A. Right there in front of the store.

Q. You were in front of the General Store? How did you happen to be there instead of school?

A. Well, we got out for lunch.

Q. Oh, school was already out?

A. We'd just gotten out.

Q. And as I understand it, you were walking in a general westerly direction down Roosevelt Avenue? A. Yes.

Q. To go home? A. Yes, sir.

Q. And you arrived at a place in front of the General Store; could you show us in that picture there, exhibit 12?

A. Yes, right here; I was right here.

Q. You're indicating a place under the drug store sign, about? A. Yes. [148]

Q. And as I understand it, Virginia Sjoberg was with you? A. Yes, sir.

Q. And was there anybody else with you girls?

A. No, sir.

Q. And she had been with you ever since you had left the school house? A. Yes, sir.

(Testimony of Shirley Johnson.)

Q. And you were just talking and visiting as you came along? A. Yes, sir.

Q. And what attracted your attention to Mrs. Phillips, when she screamed out?

A. What do you mean?

Q. When did you first see Mrs. Phillips? What attracted your attention to her?

A. Her yell, I guess.

Q. And, of course, you couldn't see Mrs. Phillips from where you were in front of the General Store if Mrs. Phillips was coming down the stairway of the beauty salon, could you? A. No, sir.

Q. And, of course, you couldn't see her as she stopped in the entrance of the beauty salon and looked at her watch, you couldn't see her then either? A. No, sir.

Q. And the thing that attracted you to her is when she yelled, [149] as you put it?

A. Well, yes, but I seen her when she walked out, but when I really looked at her was when she yelled.

Q. You noticed her as she walked out?

A. Yes, sir.

Q. And you noticed her when she yelled, and she fell, as you indicated, just a step from the door, is that right? A. Yes, from the end of it.

Q. Well, when you first saw Mrs. Phillips and you and Virginia Sjoborg were under the drug store sign, did you see that other girl, Eileen Simpson, at that time? A. Yes, sir.

Q. Where was Eileen Simpson?

(Testimony of Shirley Johnson.)

A. Well, we was up there, and she was just a little bit ahead of us.

Q. She was preceding you, going in the same direction down Roosevelt Avenue?

A. Yes, she run down to her at first. I was scared to.

Q. Oh, I see, and Eileen ran down to where Mrs. Phillips was on the sidewalk?

A. Yes, sir.

Q. You didn't notice whether Eileen slipped or anything of that sort? A. No, sir.

Q. Had you gone up that hill that morning to class, to high [150] school?

A. I don't come that way.

Q. Which way do you come?

A. Down the other way.

Q. Well, how come you were walking home that way?

A. I wasn't going home, I was going downtown.

Q. Oh, you were going downtown?

A. Noon, yes, I was going downtown at noon.

Q. And as you stated, you were fearful of going down to Mrs. Phillips right away, is that it?

A. Yes, because she scared me.

Q. And I suppose the incident upset you, too?

A. Yes, it did.

Q. And I suppose at that time you didn't take particular notice of the icicles or anything else right around there then?

A. Well, I knew they were dripping.

(Testimony of Shirley Johnson.)

Q. Well, your attention I take it was directed to that sometime after the accident, was it not?

A. What do you mean?

Mr. Kelley: Will you read her the question?

(Pending question read by the reporter.)

Mr. Wolff: If you don't understand what he means——

Mr. Kelley: She understands. Do you understand?

A. Do you mean after the accident? [151]

Q. (By Mr. Kelley): Somebody talked to you about this accident after it occurred, didn't they?

A. Did anybody talk to me?

Q. Yes.

A. I don't remember anybody talking to me about it.

Q. Well, so you had no occasion to think about the accident until you came into Court here this morning, is that it?

A. No, sir. After she did that, well, it bothered me all day, and I've always asked Thera, her daughter, in school, how her mother was.

Q. I see; you go to the same school with her daughter? A. Yes, I do.

Q. You've known her for some time, I take it?

A. Well, since we were in grade school, I believe.

Q. I see. About how many years would that be?

A. About three years.

Q. And I suppose you're all together in this Rainbow group?

(Testimony of Shirley Johnson.)

A. I don't belong to Rainbows.

Mr. Kelley: That's all.

Mr. Wolff: No further questions.

(Whereupon, there being no further questions, the witness was excused.)

MILDRED HUNTER

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff: [152]

Q. Will you tell the Court your full name, please? A. Mildred Hunter.

Q. Is it Mrs. Hunter? A. Yes, sir.

Q. Where do you live, Mrs. Hunter?

A. At 710 Pine, Coulee Dam.

Q. Have you lived there long?

A. About nine years.

Q. Do you know Mrs. Phillips, the plaintiff in this action? A. Yes, sir.

Q. Have you known her long?

A. Yes, I knew her when she formerly lived at the Dam, but not well.

Q. Are you a close personal friend of hers?

A. Well, not a close friend; just an acquaintance, I would say.

Q. Did you see Mrs. Phillips fall on the 28th of January, 1949? A. I did not.

(Testimony of Mildred Hunter.)

Q. Where were you on the 28th of January, 1949, around 11:30 in the morning?

A. I was across the street from the scene of the accident having lunch.

Q. Where do you work, by the way?

A. At that time I was employed at the Ross Clothing Store, [153] which is in the General Store Building.

Q. On the ground floor? A. Yes, sir.

Q. You were working there. When did you first learn that Mrs. Phillips fell there in front of the mezzanine door?

A. While we were having lunch we saw a crowd gather, and Bobby Newland, a high school boy, came in and told us that it was Mrs. Phillips who had fallen.

Q. Did you ever see Mrs. Phillips on the ice at that point? Did you have occasion to see her there?

A. No, I did not.

Q. Did you ever have occasion to observe the condition of the ice on the walk there?

A. Yes, I walked on it every day.

Q. Did you see the ice on the 28th of January, 1949, at that point? A. Yes, sir.

Q. Describe it as best you can.

A. Well, I would say it was very hazardous to walk on; it was rough, due to the fact mainly that icicles had been either knocked down or fallen and imbedded into that ice, was my main impression of it.

Q. Do you know whether any icicles were dripping that morning about 11:30?

(Testimony of Mildred Hunter.)

A. I don't know. [154]

Q. What time was it that you saw the condition of the ice that morning?

A. Well, I must have passed over it when I went to work at 9:00 o'clock, but I don't recall definitely thinking about it except it was dangerous and you had to be careful walking on it.

Q. Was it any different that morning at 9:00 o'clock than it was the day before?

A. I couldn't say for sure. As I remember it, it was very dangerous all that winter.

Q. And the condition was about the same that morning?

A. Yes, as I remember it.

Q. And after 9:00 o'clock that morning when did you see it next?

A. When I went out to go to lunch.

Q. And what time was that?

A. I'm not positive. I rather think about 11:30.

Q. Just before Mrs. Phillips fell?

A. Yes, it couldn't have been any earlier than that, I don't believe.

Q. And when did you see it again after that?

A. When I went back to go to the store, which would have been an hour. Our lunch hour is an hour.

Q. You didn't go over when the crowd was gathered there?

A. No, I didn't.

Q. And you next saw the ice about 12:30? [155]

A. Yes, sir.

Q. And was it the same as it was at 11:30?

A. I would say so.

(Testimony of Mildred Hunter.)

Q. Did the condition of ice change at any time after that to your knowledge?

A. Not that I can remember, definitely.

Q. That day, at least as far as you know, it was the same, and the next day?

A. I don't remember any change.

Q. Do you know whether there were icicles on the eaves directly over the entrance to the mezzanine that morning at 11:30?

A. I don't believe I could say for sure.

Q. Have you had occasion to be engaged in any activities with Mrs. Phillips before this accident?

A. Yes, sir.

Q. Do you know of any activities that she engaged in that you could tell us about?

A. Well, mainly in her Eastern Star work, she was very active and attended often, which certainly has been changed. I don't believe I've seen her there, oh, I'm sure it hasn't been half a dozen times since the accident.

Q. Do you know why she hasn't attended since the accident?

A. Well, mainly due to the fact that it is hard for her to get out and go anywhere, and there's a great deal of [156] ceremony to the work, and you're standing and sitting several times during the evening, which is difficult for her.

Q. Have you had occasion to see Mrs. Phillips endeavor to get about since the accident?

A. Yes, sir.

(Testimony of Mildred Hunter.)

Q. Will you state her condition when she tries to walk?

A. Well, one instance I can mention, at Rainbow one night she was escorted to the east as an Honor to the past mother advisor, and since they were in formals and so on she tried to walk without a cane when she was escorted up there, and I know for a fact that she had tears in her eyes by the time she got up there, due to the pain.

Q. Do you know whether she drove a car before the accident?

A. Yes, I do.

Q. And do you know whether she still drives a car?

A. I'm sure she doesn't.

Q. Do you know anything about her Rainbow Girl activities?

A. I have attended Rainbow a few times when she was there, and I do know that she was their mother advisor at the time.

Q. She was the mother advisor at the time?

A. Yes, sir.

Q. And did she continue in that capacity after the accident?

A. For a while. I'm not sure how long.

Q. Immediately after the accident? [157]

A. I don't mean she was active in it; I mean she held the office.

Q. I see. Do you know whether she performed the duties of the office after the accident at all?

A. I don't believe so. I don't see how she could. I didn't attend all those meetings, I wasn't there personally, but I happen to know that she was laid up at home for that long.

(Testimony of Mildred Hunter.)

Q. You know that she was laid up at home?

A. Yes.

Q. Did you have occasion to visit her at home while she was laid up?

A. I didn't happen to, no. I had talked to her on the telephone maybe once or twice.

Q. Do you know whether she played the piano before the accident? A. Yes, I do.

Q. And does she still play the piano?

A. I haven't seen her play since the accident. In fact, I believe she has gotten rid of her piano.

Q. She got rid of the piano? A. Yes.

Mr. Kelley: You're not making a claim for that, are you?

Mr. Wolff: Yes, I think we ought to have a new [158] piano.

Q. (By Mr. Wolff): Do you know whether anyone had been knocking icicles off that roof in front of this doorway the morning Mrs. Phillips fell, do you know?

A. I don't know. I have seen them knocking them off, but I could not swear that it was on that morning.

Q. You have seen the Bureau knocking icicles off that roof from time to time?

Mr. Kelley: Just a moment; if your Honor please, leading and suggestive.

The Court: Yes, I think I'll sustain the objection.

Q. (By Mr. Wolff): How many times have you seen them knocking icicles off that roof?

A. I'm not sure about that, but I have seen men

(Testimony of Mildred Hunter.)

knocking icicles off that roof. Now, I wouldn't swear they worked for the Bureau of Reclamation, but I assumed they did.

Q. What was there about them that made you feel they were from the Bureau of Reclamation?

A. Simply that no one else around there ever did that work, as far as I know.

Q. Did you have occasion to see the trucks they came in, or the uniforms they wore, or anything?

A. They didn't wear uniforms, and I didn't see a truck.

Q. Do you know whether the gutters were filled with ice or not on the 28th of January, 1949, over the point where Mrs. [159] Phillips fell?

A. I don't know.

Q. Have you ever seen the eaves run over with water at that point?

A. Yes, sir. I'm now employed at Sears order office, which is between that point and the bank, and I know that just rain, just ordinary rain, will not carry off in those gutters. You can hardly get in and out our door when it rains very heavy. Now, I don't know whether they leak or whether they run over, but I know they don't carry it off properly.

Q. Are you referring to this particular point where this door is?

A. It would be a few feet from there. It's not the same entrance.

Q. Do you know what the condition is of the gutters over the entrance to the mezzanine door?

A. No, I do not.

(Testimony of Mildred Hunter.)

Q. Do you know whether or not those gutters leak at the joints? A. I don't know.

Mr. Kelley: Well, she——

The Court: Well, I think I'll sustain an objection to that.

Mr. Wolff: That's all, you may inquire. [160]

The Court: Well, I think it's time for us to adjourn here. The Court will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p.m., the Court took a recess in this cause until Thursday, April 12, 1951, at 10:00 o'clock a.m.) [161]

Thursday, April 12, 1951

(All parties present as before, and the trial was resumed.)

Mr. Kelley: I have no cross-examination of the witness Mrs. Hunter.

(Whereupon, there being no further questions, the witness was excused.)

RAY UPRIGHT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your name, please?

A. Ray Upright.

Q. Where do you live, Mr. Upright?

(Testimony of Ray Upright.)

A. Electric City.

Q. And how long have you lived there?

A. About ten years.

Q. What's your occupation?

A. I'm a merchant.

Q. What do you deal in?

A. Groceries, mainly.

Q. What's the name of your store, Mr. Upright?

A. Ray's Grocery.

Q. Is that in Electric City?

A. Yes, sir. [162]

Q. Do you know Thera Phillips, the plaintiff in this action? Do you know Mrs. Phillips?

A. Yes.

Q. Did you have a store in January, 1949?

A. Yes, sir.

Q. The same store? A. Yes, sir.

Q. Are you familiar with the property in Coulee Dam known as the General Store Building?

A. Yes, sir.

Q. And you're familiar with the sidewalk along Roosevelt Avenue adjoining the building?

A. Yes, sir.

Q. Do you know where the entrance to the second floor, called the mezzanine door, is along the sidewalk? A. Yes, sir.

Q. Calling your attention to the 28th of January, 1949, I ask you if you had an occasion on that day to know the condition of the sidewalk in front of the door to the mezzanine stairs?

A. I believe I do, yes.

(Testimony of Ray Upright.)

Q. Will you state what the condition of the walk at that point was?

A. To the best of my knowledge there was from four to five inches of ice from the edge of the building out to nearly [163] the curb on the street. There was a pile of snow along the edge of the road, along the edge of the sidewalk, that was probably from three to four feet deep, and there was tunnels that was cut through the snow onto the sidewalk, and when you walked on the sidewalk you had to be very, very careful. The water would drip off the eaves previous to that, it had been that way, as I remember, about a week, and the water would just keep piling up, and it was smooth ice with probably some ripples in it as the water would run down across it.

Q. Were there any ridges at all along that ice in front of the door? A. Ridges?

Q. Ridges. By that I mean places where the ice may have piled up in rough and uneven piles.

A. Well, as the water would drip off an eave, like up there, and drip down, it would make holes in the ice, and then as it would run down it would just make another coating on top of it; it depending on the temperature naturally made some holes in the ice, just like a faucet when it drips.

Q. Were there any icicles hanging over that point at that time?

A. At that time, I don't know.

Q. And for how long a period before the 28th did this condition exist, if you know?

(Testimony of Ray Upright.)

A. To the best of my knowledge, I was down there probably three [164] times, maybe four times during the week, and each day it just kept getting a little higher, the ice.

Q. A little what?

A. The ice kept piling up a little higher all the time.

Q. And were you there after the 28th of January, 1949, and have occasion to examine the condition?

A. As I remember, I was there the next week, but I do not remember what the condition of the sidewalk was. I know that it was in bad shape for a long time there.

Q. Did you have some particular business in that area that brought you to this General Store Building or along this sidewalk?

A. I do my banking there.

Q. You do your banking there? A. Yes.

Q. That's the bank that's in the General Store Building? A. Yes.

Q. What's the name of that bank, if you remember? What's the name of the bank?

A. Coulee Dam Branch, now.

Q. Seattle First National?

A. Seattle First National branch, yes.

Q. Did Mrs. Phillips patronize your store prior to the time of the accident? A. Yes. [165]

Q. Does she still patronize your store?

A. Yes.

(Testimony of Ray Upright.)

Q. Do you know whether there has been any change in the way she gets around, that is, now, as compared to the way she was before the accident?

A. Previous to the accident she drove to the store, which is probably two and a half or three miles. She done all her own shopping. Since the accident I have delivered all of her groceries to her. The only time she comes to the store is when her husband or somebody brings her up. She is unable to drive.

Q. When the deliveries are made do you make them personally, Mr. Upright? A. Yes, sir.

Q. Have you had occasion to observe Mrs. Phillips in her home?

A. Both home and in my store.

Q. Will you just state what her condition is now as to her ankle insofar as you may have observed?

A. I have watched her when she has been to the store occasionally, and as long as she didn't know I was watching her she held on to things as she went down the aisles to pick up her groceries. She was unable to stoop to pick up her groceries, I always helped her, but she always had to have something to hang on to. At home I have seen her [166] on the davenport with her ankle swelled about as big as her regular leg is, and she never gets up without her cane.

Q. Was she expecting you on this occasion you mention when you saw her on the davenport?

A. No; I knock on the door and stick my head in the parlor and ask her if I can come in.

(Testimony of Ray Upright.)

Q. Do you remember specific occasions such as you have just mentioned?

A. I do. I can't give you any dates, but I have seen it many times.

Q. Do you know whether she walks around the house without a cane?

A. I have never seen her walk without a cane unless she was close enough to something to hold on to, to balance herself.

Q. Have you seen any evidence of pain on her part since the accident? A. I would say yes.

Q. State what you may have observed in that regard. A. I'll do the best I can.

Q. Yes.

A. Her nature today is not the same as it was when I knew her before the accident. Her leg undoubtedly bothers her; she favors it continually. You kind of stump me; I don't know what else to say, I don't know how to say it. I know [167] what I want to say, but I don't know how to say it.

The Court: Well, I think what we want is not your conclusions or what you think may be her condition, but any evidence that you have seen that would indicate that she has pains.

A. Well, the only best evidence I could give you would be just when she would try to get in and out of the car, or around the house, by just watching her expression, because you could tell it hurt her. In other words, if it didn't hurt her, her expressions wouldn't be there.

(Testimony of Ray Upright.)

Q. I think you said she's not the same person as she was before; just what do you mean by that, Mr. Upright?

A. Well, she gets mad more easily, I know that. She had always been able to get around, and was very even tempered, and it seems that something irritates her now.

Q. What was her disposition before this accident, if you know?

A. Very, very fine, as far as I know.

Q. And since the accident—I think you've answered it, haven't you, since the accident. You were in court yesterday, weren't you, Mr. Upright?

A. Yes, sir.

Q. Did you hear the government man, Mr. Benjamin, indicate that they had tried everything they knew to get rid of the ice in the gutter along that building?

A. Yes, sir. [168]

Q. And you indicated to my associate Mr. Kreshel that you thought there was something they could do that would assist that ice?

A. Yes, sir.

Q. What is there that you know about that should assist in disposing of ice under those conditions?

Mr. Kelley: Just for the record, I think this would be improper, not sufficient of a foundation to qualify him as an expert on building construction, elimination of ice, and so forth.

The Court: Well, assuming first it is the function of expert testimony, I don't think there's any

(Testimony of Ray Upright.)

foundation laid to show he is an expert in construction of eaves, clearing of sidewalk, and so on. I think perhaps an engineer might be an expert on that.

Mr. Wolff: I think if he's had some experience of that type then we should be able to show it.

The Court: Is that shown in the record?

Mr. Wolff: No, that hasn't been done.

Q. (By Mr. Wolff): Mr. Upright, have you had any experience with ice in gutters?

A. I had a similar occasion as to the one down there on that building, on my own building. I bought a—I don't know what you call them; all hardware stores sell them, they're a double wire about twelve feet long, hook them into a [169] light socket, and they're a leaded cable, you can string them wherever you want to, they won't catch fire. I put them along my eaves on top of my roof. It done away with my icing condition and I never had any trouble.

Q. What do they do, for the record?

Mr. Kelley: Just for the record, I object to that and I further move to strike the previous answer on the grounds of not sufficient qualifications, and secondly, no showing of the same or similar conditions as it is involved in the General Store Building.

Questions by the Court:

Q. Where is your store?

A. Electric City.

(Testimony of Ray Upright.)

Q. How far from this store we're talking about?

A. About three miles.

Q. Are the climactic conditions about the same as they are at the general store?

A. Yes, they are.

The Court: Overrule the objection.

Mr. Kelley: I had in mind the construction.

Questions by the Court:

Q. What kind of a building is it?

A. Exactly the same kind.

Q. A wood frame? A. Yes, sir. [170]

Q. What kind of roof does it have?

A. It has a roof that is not quite as steep a pitch as the Co-Op has.

The Court: I'll overrule the objection.

Further Direct Examination

By Mr. Wolff:

Q. And this electric cable you installed, what does it do with the ice that forms in the gutters?

A. It melts it, and causes it to run off.

Q. And do you then have difficulty with the ice in the gutters?

Mr. Kelley: Just for the record, your Honor will allow us objections on the grounds of competency to all this testimony?

The Court: The record may show that.

Q. (By Mr. Wolff): Do you have any difficulty with ice in the gutters when you use a device of that type? A. No, sir.

(Testimony of Ray Upright.)

Q. From your knowledge of the conditions on the General Store Building do you feel that the same type of device could be used on that building?

A. Yes, sir.

Mr. Wolff: That's all; you may inquire.

Cross-Examination

By Mr. Kelley:

Q. I believe, Mr. Upright, you said that you are familiar with the sidewalk there in front of the General Store Building [171] as shown by exhibit 12?

A. Yes, sir.

Q. And I believe you said that you had been down there three or four times a week to do your banking business at a bank in close proximity to that store building?

A. Yes, sir.

Q. So you had occasion to use the sidewalk in front of that store building quite a bit yourself?

A. Yes, sir.

Q. And I assume that you observed many other people using that sidewalk at the same time you were using it?

A. Yes, sir.

Q. And it's correct, is it not, as Mrs. Hunter testified, that on the day in question, January 28, 1949, a person had to be very careful in going over that sidewalk, because of the icy condition?

A. You say they had to be careful?

Q. Yes.

A. Yes, sir.

Q. And by the way, you yourself went over the sidewalk in front of the General Store where Mrs. Phillips fell that very day yourself?

(Testimony of Ray Upright.)

A. Yes, sir. To the best of my knowledge I done my banking that day, and the only thing I can say is——

Q. That's all right, if you'll just permit me to ask the [172] questions.

A. Excuse me, go ahead.

Q. Then as I understand it from your testimony, there were piles of snow up on the curb on Roosevelt Avenue, of the street?

A. The snow had been pushed out of the street up along this curb, that's right, and there was tunnels cut through where the people got out of their cars, they parked there and walked through these tunnels onto the sidewalk.

The Court: Do you mean tunnels, or cuts?

A. Just cuts.

Q. (By Mr. Kelley): How high?

A. I would say to the best of my knowledge that there was snow and sand and et cetera pushed up there that would go from two to three feet.

Q. Two to three feet? A. Yes, sir.

Q. And at different intervals there were cuts through this snow piled up?

A. It was either cuts or you went over the top of it, that's right.

Q. Do you recall whether there was a cut leading into the doorway of the mezzanine?

A. I do not.

Q. In any event, this snow condition was there on the curb so [173] that a person walking in the general easterly direction up Roosevelt Avenue

(Testimony of Ray Upright.)

couldn't walk up the curb, they'd have to go in the street or on the sidewalk, wouldn't they?

A. Yes, you'd have a little differential there, because the plows just kept pushing it up there, and you'd have a strip through there; now, that's all that I know of.

Q. By the way, was there also an accumulation of snow on the sidewalk in front of the General Store, and particularly in front of the beauty salon entrance there, was the snow on the sidewalk too?

A. You mean on top of the ice?

Q. Yes. A. Not to my knowledge, no.

Q. Oh, did you observe ridges of ice on the sidewalk?

A. I don't know how to answer that. I would say no. The sidewalk was nearly flat, however, sure there was some waves in it, but I don't think you'd call them ridges. A ridge is sharp, isn't it?

Q. I didn't quite understand your testimony when I was sitting over there about four or five pieces of ice.

The Court: Four or five inches of ice, I think he said.

A. Four or five inches of ice, of accumulation ice.

Q. By the way, as you have testified, there was a bad condition there for about a week? [174]

A. To the best of my knowledge, yes.

Q. To the best of your knowledge?

A. Yes.

(Testimony of Ray Upright.)

Q. And I believe you said you had lived in Electric City for ten years or so? A. Yes.

Q. And this weather condition there, Mr. Upright, this winter of 1949, was the first real cold weather experienced since January, 1937, isn't that your recollection?

A. You can stop me if you don't like this answer. My answer is we have winter down there every year, and water will freeze in 20 above just the same as it will freeze at 20 below.

Q. Yes, I understand, but wasn't this winter of 1949 the most unusual cold weather that you had experienced while you were down there? Isn't that true?

A. No, I can't say truthfully that it was much different than any other winter. Now, it may have been, according to weather reports, but what I mean is—I don't know how to answer that. It just don't seem that it was any worse that year than it was the winters before.

Q. It didn't. Directing your attention to the day of the accident—by the way, did you know about the accident the day that it happened?

A. Yes, I heard about it after it [175] happened.

Q. Well, did you know about it that day?

A. Yes.

Q. Well, then you recall that snow was falling since 8 o'clock in the morning of that day?

A. I can't recall the snow. However, in the Coulee we get a condition that you don't get here,

(Testimony of Ray Upright.)

and we get what is called frozen fog which is very light, very fluffy, any wind just picks it up.

Q. Well, do you recall that since 8 o'clock in the morning that day you had this condition you describe as frozen fog which any wind will pick up because it's fluffy? That was the situation that day, wasn't it? A. Truthfully, I don't remember.

Q. You don't remember. Was there anything with your experience with the electric cable to get rid of ice in your gutters that would refresh your memory as to the weather conditions there?

A. No. I just had so much trouble with my roof that I finally got one of those things.

Q. Yes, when did you get one of those things, electric cable, what year?

A. That I can't answer. I do not know. It was either two or three years ago. I don't know whether it was the winter of 1949 or 1950.

Q. Well, didn't you as a matter of fact get it in the winter [176] of 1950 after the severe winter of 1949? A. That I don't know.

Q. Well, now, just a moment; whereabouts did you get this electric cable from?

A. From the plumber right across the street from our store.

Q. And what's his name? A. Brenchley.

Q. Give us his full name for the record, please.

A. Brick Brenchley.

Q. And how much did you pay for this electric cable?

(Testimony of Ray Upright.)

A. Somewhere between ten and twelve dollars, in that neighborhood.

Q. And how long was this electric cable?

A. It's either ten or twelve feet.

Q. And it's hooked up to what?

A. A 110 light socket.

Q. Well, now, does that refresh your recollection that you got this electric cable in the winter following this severe winter of 1949, or not?

A. I don't know whether I got it that year or the year following.

Q. Yes. You will not testify under oath, Mr. Upright, that you bought that in 1949——

Mr. Wolff: I object.

The Court: Wait until counsel finishes his question; [177] you can't both talk at once.

Mr. Kelley: Will you read the question?

(Pending question read by the reporter.)

The Court: I'll overrule the objection; go ahead.

Q. (By Mr. Kelley): ——or in any year prior to 1949?

A. Uh, the only answer I could give you, Mr. Kelley, is that I could look it up in my expense book to find the exact date; that's the only way I could tell you. I have it all recorded.

Q. Do you have the expense book here?

A. No, I haven't.

Q. Is this gentleman that you referred to, is he still in Coulee Dam? A. Yes, sir.

(Testimony of Ray Upright.)

Q. Now, with regard to your experience with ice in gutters and matters of construction, how old are you, Mr. Upright?

A. 39 or 40; 40, I guess.

Q. What is your formal education?

A. Just a grocerman, is all.

Q. Have you gone to any engineering school?

A. No, sir.

Q. Any trade school relative to the construction of frame buildings or otherwise? A. No, sir.

Q. And how long have you been a grocerman? [178]

A. I've been in my present location nearly ten years, and then I worked in that location for a year and a half.

Q. And then before that year and a half what was your occupation?

A. I was on the coast, and at one time I had a small restaurant, and I went to school.

Q. And whereabouts did you go to school?

A. In Tacoma.

Q. High school? A. Stadium.

Q. How far along did you get?

A. Through the third year in high.

Q. And that's the nature and extent of your occupations since you got out of the third year of high school, as you've indicated to us?

A. Outside of a few odd jobs, yes.

Q. Those odd jobs I take it had nothing to do with construction? A. No, sir.

Q. Will it put you to much trouble to get this

(Testimony of Ray Upright.)

expense book you're talking about, when you bought the electric cable? A. How quick?

Q. Well, I ask will it put you to much trouble to get it? Can you phone down for it?

Mr. Wolff: Do you mean make a long distance telephone [179] call, Mr. Kelley?

Mr. Kelley: Yes.

Mr. Wolff: I don't think the witness is called on to go to that expense.

Mr. Kelley: Well, I'm just asking him.

The Court: Any other questions? Were you through cross-examining?

Mr. Kelley: Yes.

Redirect Examination

By Mr. Wolff:

Q. Mr. Upright, this electric cable you talked about, is that something that's sold by plumbing or hardware stores in a package over the counter, or something that has to be made up and ordered according to the job?

A. No, I'm sure you can get them right up here at Jensen-Byrd, the same thing.

Q. A packaged item that's sold over the counter? State your answer verbally, please.

A. Yes.

Mr. Wolff: That's all.

The Court: I think in view of all of the testimony here that the Court should grant the defense motion to strike that portion of this witness' tes-

timony which pertains to his use of the heating cable to keep ice out of the gutter on his own store, and his opinion as to whether that method could have been employed on the store building [180] involved in the present suit. I don't believe he's been shown to qualify as an expert in the field of how to keep ice from forming in a gutter, and it would seem to me what has been done in one other instance is not competent evidence. I think if the plaintiff relies upon that it should be possible to get experts to testify. All right, that's all, Mr. Upright.

(Whereupon, there being no further questions, the witness was excused.)

JACK BERRY

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Jack Berry.

Q. Where do you live, Mr. Berry?

A. Coulee Dam.

Q. At Coulee Dam? A. At Coulee Dam.

Q. How long have you lived there?

A. About four years.

Q. What is your occupation?

A. I'm a service engineer with the Westinghouse Electric Manufacturing Company, presently

(Testimony of Jack Berry.)

engaged in supervising the installation of generators at Coulee.

Q. Have you had any training in engineering, Mr. Berry? [181]

A. Yes, I have a degree in electrical engineering.

Q. Where did you receive your degree?

A. University of Washington.

Q. And when did you receive that, by the way?

A. Class of 1937.

Q. 1937? A. Yes.

Q. And what fields have you been engaged in since 1937?

A. Installation of rotating equipment, and general supervision of other engineers.

Q. In the engineering field at all times since 1937? A. Yes.

Q. You're now employed by Westinghouse, you stated? A. Yes.

Q. Mr. Berry, are you familiar with the property in Coulee Dam known as the General Store Building? A. Yes.

Q. And familiar with the north side of the building where there's a sidewalk along Roosevelt Avenue adjacent to the building? A. Yes.

Q. And are you familiar with that point along the building where there is an entrance to the mezzanine floor? A. Yes.

Q. I ask you if you had occasion to observe the condition of [182] that sidewalk in front of that entrance to the mezzanine on the 28th of January, 1949?

(Testimony of Jack Berry.)

A. I had occasion to check the sidewalk the afternoon of that day.

Q. And what did you observe as to the condition of the sidewalk on the afternoon of the 28th?

A. As I recall, the accumulation of ice at that time was being attempted—they were attempting to remove the accumulation of ice in the afternoon of January 28th.

Mr. Kelley: Simply for the record, your Honor, we object on the grounds of competency of any actions subsequent to the occurrence of the injury complained of.

Mr. Wolff: The purpose of this testimony, your Honor, is to show that there was ice there.

Mr. Kelley: I won't labor it as I would if we had a jury.

The Court: Very well, overruled.

Q. (By Mr. Wolff): What was the ice condition at that time, Mr. Berry?

A. Well, as I recall, the accumulation had developed from drippings from the roof on to the sidewalk, and the water had frozen on the sidewalk and had built up a considerable layer of ice.

Q. Are you able to state how high the layer of ice was in front of the doorway? [183]

A. No. It was noticeably thick where they were chipping the ice, where I noticed it, you could see the difference between where they had removed it and where the ice was still there.

Q. By the way, who was doing this removal job?

(Testimony of Jack Berry.)

A. Well, as I recollect at that time I assumed they were Bureau personnel.

Mr. Kelley: I move to strike the assumption, if your Honor pleases.

Mr. Wolff: We can't testify to what we assume.

The Court: Yes, I'll sustain the objection to that.

Q. If you know some facts——

The Court: I might say that this evidence of removal of ice, as I understand, is offered and will be received to show what the condition was at that time. It's my understanding that any action that may be taken after an accident isn't to be taken as an admission of faulty condition or negligence on the part of the defendant. That was your point, Mr. Kelley?

Mr. Kelley: Yes.

Mr. Wolff: It's not offered for that. While I do believe the cases will show it's admissible for that purpose, we do not offer it now for that purpose, but we do feel there is another purpose in addition to the one I mentioned earlier, and that is to show maintenance and [184] control by the Bureau, the fact they were removing both before and after, and I think it's admissible for that purpose.

The Court: All right, go ahead.

Q. (By Mr. Wolff): Can you state what you observed as to who these men were that were removing the ice?

A. I wouldn't know their names. My observation is only based on the fact that I recognized

(Testimony of Jack Berry.)

them as men that perhaps did other work around the area.

Q. Who did they do the other work for?

A. For the Bureau of Reclamation.

Q. Now, as to the condition of the ice and snow, or the ice, if it was just ice, and by the way, was there any snow there, or was it just ice?

A. Oh, it had snowed some time before that, I don't know how long, and there was patches of snow, perhaps, on the roadway or on the edges of the road, but I don't recall any snow on sidewalks that had been cleaned, or any fresh snow that day.

Q. Can you state whether the ice formation was smooth or rough or just what its condition was in front of the doorway at that time?

A. Ice forming on a sidewalk from drippings from the roof naturally builds up a little higher where the water drips, and was perhaps thickest at that point, and tapered off to [185] a rather thin layer out near the edge of the sidewalk.

Q. This thick condition, will you state as specifically as you can where it was? Where did you find the thickest condition of the ice?

A. On that sidewalk, from drippings from the roof, the thickest part of the ice is, oh, anywhere from one to two or three feet out from the building.

Q. And where was it in regard to the side lines of the doorway as they would be extended?

Mr. Kelley: Pardon me; just for the record, which doorway?

(Testimony of Jack Berry.)

Q. The doorway to the mezzanine stairs. Did you answer?

A. The thickest icing condition is, as I say, from one to three feet, perhaps two feet would be a better average, from the edge of the building, which would also be from the door.

Q. And did the—we might call it ridge of ice—extend past the doorway east and west, or was it confined to the doorway area?

A. East and west is the length of the building?

Q. Yes.

A. It extended practically the entire length of the building.

Q. Do you know, Mr. Berry, how long that condition existed before you saw it on the afternoon of the 28th?

A. The icing condition on that sidewalk exists practically all [186] winter long.

Q. It did that winter so exist? Give your answer audibly.

A. 1948 and 1949; every winter, in my experience.

Q. Did you have occasion to see the condition on the walk during the week before the 28th?

A. I go by the area once or twice a day.

Q. And did you go by that area once or twice a day during the week prior to the 28th?

A. Yes.

Q. And you observed the ice condition there during that period?

A. I perhaps walked on it two or three times during the week.

(Testimony of Jack Berry.)

Q. You walked on it yourself? A. Yes.

Q. Now, Mr. Berry, did you have occasion to observe the conditions of the gutters on the General Store Building over the doorway to the mezzanine on that day, the 28th of January?

A. The ice on the sidewalk forms mainly from an over-run of the gutters, when the gutters freeze over.

Mr. Kelley: I would think this is repetition and not responsive, if your Honor pleases.

Mr. Wolff: I think he was explaining what he saw as to the condition of the gutters.

The Court: Well, I'll overrule the objection.

Q. (By Mr. Wolff): Had you finished, Mr. Berry? [187] A. Yes.

Q. And can you state whether the gutters were in good or bad condition at that point on that day?

A. Well, I couldn't say as to the repair of the gutters. Insofar as they themselves are concerned they may have been in good repair. However, they were clogged with ice, and icicles were hanging from the edge of the gutters.

Q. Were they doing the job that gutters are intended to do?

Mr. Kelley: Well, if your Honor pleases——

The Court: I'll sustain the objection to that. As I understand your testimony, without taking too much time, Mr. Berry, what you observed was, as I understand it, the water from the roof melted and ran into the gutters and blocked it up?

(Testimony of Jack Berry.)

A. Blocked it up, yes, and then ran over the edges.

The Court: Ran over the edges and spilled on the sidewalk?

A. That's right.

The Court: Go ahead.

Q. (By Mr. Wolff): Are you familiar with any type of electrical device that might be used to melt ice in gutters?

A. Well, I know that there are devices on the market for keeping gutters above the freezing point so that they will not block up and plug up.

Q. And are you familiar with the construction of the eaves and [188] gutters of the General Store Building at this point over the doorway?

A. Yes.

Q. And from your training as an electrical engineer and your experience, are you able to state whether or not there is a device on the market to prevent this clogging of the gutters that you've described?

Mr. Kelley: Just a moment; I object to that on the grounds that in the first place he hasn't been properly qualified to propound a hypothetical question to him, and in the second place the question is too broad, and in the third place it doesn't embrace the necessary facts as far as this case is concerned, to propound a hypothetical question.

The Court: I would think that since he's an electrical engineer that his experience or lack of experience in a particular field would go to the

(Testimony of Jack Berry.)

weight of his testimony rather than its admissibility. It seems to me perhaps the question might be whether as an electrical engineer he knows of any method by which this condition could be remedied, rather than whether there is a device on the market.

Mr. Wolff: We'll ask the question in that form.

Q. (By Mr. Wolff): As an electrical engineer, do you know of any means by which this condition of the ice freezing in the [189] gutters and spilling over could be remedied?

Mr. Kelley: Just for the record, your Honor, I don't want to prolong this, we object on the three grounds hitherto urged, and on the further ground that an expert, while an expert may state his opinions based on assumed facts, they must be shown by the evidence of other witnesses or by the testimony of the expert himself in this case, and that has not been done, nor incorporated in the question, and then as a fifth and final ground, the question cannot be based upon the testimony given by the witness himself where this is merely assumed to be true.

The Court: Well, as I understand it this witness observed personally the condition of the gutters, and now he's testifying as an expert as to what could possibly remedy the conditions which he saw, and to which he's testified. Have you got any authorities that an expert can't base his opinion on his own observation of facts? Can he take the stand and testify on the basis of these facts?

(Testimony of Jack Berry.)

Mr. Kelley: No, I think the rule is very familiar, as your Honor indicated, that if the expert has personal knowledge of the facts, a question may be propounded to him, of course, but I didn't think that was the situation we had here.

The Court: The record shows your objection. It will [190] be overruled.

Q. (By Mr. Wolff): Do you understand the question, Mr. Berry?

A. I believe. I believe that there are—that resistance wires, to be specific, could be laid in the gutters to keep them free of ice under most conditions.

Q. And under the conditions that existed at this point? A. I believe so.

Mr. Kelley: As the winter of 1949?

Mr. Wolff: Of course, the witness is subject to cross-examination.

Mr. Kelley: Excuse me.

Mr. Wolff: We were referring all the way through to the particular time and place.

Mr. Kelley: Very well.

Mr. Wolff: You may cross-examine on that.

The Court: Had you finished your direct?

Mr. Wolff: No.

Q. (By Mr. Wolff): Mr. Berry, did you know Mrs. Phillips before she fell on the 28th of January? A. Yes.

Q. Have you been able to observe any change in the way she gets about since the 28th?

(Testimony of Jack Berry.)

A. Oh, yes, she seems to be handicapped in getting about at the present time.

Q. Can you state what facts you've observed in that regard? [191]

A. Well, at present she walks with a cane, and limps when I see her walking.

Q. Have you had occasion to see her when she was not in public since the 28th? A. Yes.

Q. Does she walk with the cane when she's not in public?

A. Oh, I've seen her reach from object to object in the house and leave the cane perhaps at the table or something.

Q. Do you know whether she suffers any pain at this time?

A. Oh, it was my impression that she was suffering.

Q. And what's the basis of that impression, Mr. Berry?

A. Oh, I can perhaps recall one instance at a social gathering where various games were played, and she sat down in a chair with her foot stuck out in the room all evening.

Q. Do you know, by the way, about her activities, those that she took part in before the accident?

A. Oh, somewhat.

Q. State what activities she participated in before the accident.

A. I'm not familiar too much with her social activities as I'm not connected with her lodges and what not. In my own recollection the Phillips and

(Testimony of Jack Berry.)

the wife and I have on occasions fished the San Poil River, which is not very far from there. Mrs. Phillips didn't do much fishing, but she went along in the party and seemed to enjoy herself. [192] Since then, since she had her accident, I think most of her fishing degenerated to boat fishing. I think it was about the time that she discarded her crutch, it was during the hunting season of immediately after her accident, I believe, in November, I believe, we wanted to—thought we would try to arrange a little trip for her to get away from the house, and we took a hunting trip on a boat that I own on Lake Roosevelt for two or three days, and as I recall, on that trip she couldn't get off of the boat any time during the trip, that she stayed on the boat when we went hunting.

The Court: The Court will take a five-minute recess. If you have the doctor coming after recess, Mr. Wolff, put him on, and then we can cross-examine this witness later.

(Short recess.)

The Court: Do you wish to proceed with this witness?

Mr. Wolff: Yes.

Further Direct Examination

By Mr. Wolff:

Q. Mr. Berry, we were discussing what you might know as to any change in Mrs. Phillips before and after the accident, and you had told how she had difficulty getting around, and stayed in the

(Testimony of Jack Berry.)

boat during a boat trip? A. Yes.

Q. Did you have occasion to experience anything else as to changes in Mrs. Phillips before and after the accident? [193]

A. When Mrs. Phillips came home from the hospital I used a truck that's at my disposal to haul the hospital bed down to her place, and I helped her, one of those that helped her get into the bed, and I saw her from time to time, oh, maybe once every two weeks or so since then.

Q. So when she came home from the hospital she was in a hospital bed? A. Yes.

Q. How long was she confined to that bed, if you know?

A. Oh, I believe it was two or three months.

Q. And do you know how she got around after she got out of bed?

A. As I recall, after she got out of the bed they put her on a crutch, and she hobbled around as best she could on crutches.

Q. Do you know what the apparatus was on her leg at that time?

A. As I recall she had a walking iron on her leg, but claimed that she couldn't use it.

Q. And do you know when she discarded the crutch?

A. Oh, she was on crutches for quite a while, I don't know just how long she was on crutches; I never did see that transition.

Q. And I believe you testified that you know she's using a cane all the time now?

(Testimony of Jack Berry.)

A. Yes, I know she's using a cane now. [194]

Q. Have you had occasion to observe any change in her disposition, Mr. Berry, after as compared to before the accident?

A. Mrs. Phillips used to be—I put it perhaps rather crudely—used to be a cheerful—had a cheerful nature and very jolly, as associated with rather stout persons. Well, she's not quite as cheerful at all times when I have been around her as she used to be. I believe she's improved quite a bit, though, since shortly after the accident.

Q. But still you feel she's not as cheerful and happy as she was before?

A. I don't believe she is.

Mr. Wolff: That's all; you may inquire, Mr. Kelley.

Cross-Examination

By Mr. Kelley:

Q. What was the occasion of your examination of the condition of the sidewalk there the afternoon after the accident? How did you happen to go up there?

A. I heard about the accident, oh, sometime in the afternoon, and it so happened that we were having a charter night for the Rotary Club that night. Mr. Phillips happens to be a member of the club. We were very much—by the way, it was going to be a ladies' night, too. We were very much disturbed by the fact that Mrs. Phillips was injured, and out of curiosity I recall stopping and looking at the [195] condition of the ice, and as I

(Testimony of Jack Berry.)

recollect, what I've told you before, very little except that there was ice there and men chipping the ice at that time.

Q. Did I get in my notes correctly that you're a service engineer with Westinghouse engaged in the installation of generators at the Coulee Dam?

A. Yes.

Q. You aren't a building inspector or anything of that nature at the Bureau of Reclamation?

A. I have no connection with the Bureau whatsoever.

Q. And as I understood it, you got a degree in electrical engineering from the University of Washington?

A. That's right.

Q. I take it—or do you happen to have a mechanical engineering degree, too?

A. I have an electrical engineering degree.

Q. You don't have a mechanical?

A. Most of my experience after being with the Westinghouse organization has been mechanical.

Q. Well, then, with respect to these electrical devices, have you ever put in any, yourself, personally?

A. No.

Q. Had ever any electrical devices that you've referred to ever been put under your direction and supervision?

A. No. [196]

Q. By the way, you said that you knew they were on the market. Do you know what makes, or who makes them? Does Westinghouse make one of them?

A. There are devices advertised by Sears and

(Testimony of Jack Berry.)

Roebuck and Montgomery Ward that are approved by the Underwriters, for such purpose.

Q. And the nature or extent of your familiarity with them, you've seen them in the catalog, I take it?

A. That's one of them.

Q. Well, you haven't ever worked around them or with them, have you?

A. I've used resistance wires for quite a number of other purposes.

Q. Well, I don't want to go far afield. I'm just asking you if you ever worked around or been familiar with electrical devices you've been testifying about?

A. I have never installed a device of that nature in a gutter.

Q. And I take it you wouldn't know how many thousand feeting of heating wire would be necessary to use in the gutter of this General Store Building as shown in plaintiff's exhibit 13, even if it were susceptible to an electrical device?

Mr. Wolff: Just a moment; are you referring to the whole building, Mr. Kelley, or to the one place of the building over this doorway?

Mr. Kelley: Will you read him the question, Mr. [197] Taylor?

A. Those devices are made up in units——

Mr. Kelley: Just a moment; I wanted you to give an answer, if you could, responsive to the question.

(Pending question read by the reporter.)

(Testimony of Jack Berry.)

A. I might say that two or three runs of assembled units the entire length of the gutter would do it. I don't know how long the building is.

Q. No, and you don't know how wide it is, do you?

A. I could make an approximation. I've seen the building.

Q. Well, you haven't made any investigation of the premises; you're not testifying from personal facts as to the engineering features involved in this General Store building, are you?

A. We're talking about the engineering features of the gutter.

Mr. Kelley: Read him the question.

(Pending question read by the reporter.)

A. No.

Q. (By Mr. Kelley): And, of course, you wouldn't be able to tell us how many circuits would have to be used there, as an engineering proposition, would you?

A. Oh, that wouldn't take long to figure out.

Q. No, but you can't tell us now, can you?

A. If you will tell me the type of units to be used, yes, I could tell you now. [198]

Mr. Kelley: Will you read him the question, please?

(Whereupon, the question was read by the reporter as follows: "And, of course, you wouldn't be able to tell us how many circuits would have to be used there, as an engineering proposition, would you?")

(Testimony of Jack Berry.)

A. Assume each circuit to be ten feet long, and if you used three circuits in parallel, and divide the length of the building by ten feet, and multiply it by three, would be perhaps a rough estimate of the number of circuits you'd need.

Q. Yes, but you made no personal investigation so you could give us even an approximation of what that would be?

A. That's an approximation I gave you right now.

Mr. Kelley: Will you read the question?

(Pending question read by the reporter.)

A. I've made no preliminary estimation.

Q. As a matter of fact you made no personal investigation or examination of this General Store Building with the idea of installing electrical devices, did you? A. No.

Q. By the way, do you know what the pitch of that General Store Building is as shown by exhibit 13?

The Court: That question isn't clear to me; perhaps it is to the witness. Do you mean the pitch of the roof? [199]

Mr. Kelley: Thank you, your Honor; I meant the pitch of the roof. I had my own thought on that; the pitch of the roof.

A. No, I don't know what the pitch of the roof is.

Q. (By Mr. Kelley): Can you approximate that, as an engineer, by looking at that photograph, exhibit 13? A. It has two slopes.

(Testimony of Jack Berry.)

Q. Well, what is the general over-all pitch of the roof?

Mr. Wolff: Are you referring, Mr. Kelley, to the pitch at the point of the eaves, or the pitch at the high point of the building?

Q. Do you understand the question, Mr. Berry?

A. Which part of the roof?

Q. Well, if you want to take them in segments, what is the pitch first from the high part of the roof to the first ending of the first incline, where I've indicated with my pencil in Exhibit 13?

A. Oh, first let me say that a picture——

Q. If you'll just answer the question. If you can't answer it say so, and we'll drop it. Will you read him the question again?

The Court: Do you know the pitch of the roof?

A. I don't know the exact pitch of the roof, no.

The Court: All right, ask another question. I don't suppose he would know unless he's measured it. [200]

Q. (By Mr. Kelley): Can you tell from that picture? A. No.

Q. And you haven't measured it, have you?

A. No.

Q. But you do, or do you, realize as an engineer that the pitch of the roof is very important in arriving at any opinion as to whether or not an electrical device would be feasible from an engineering standpoint in removing ice?

(Testimony of Jack Berry.)

A. I wouldn't think it would be too important.

Mr. Kelley: That's all.

Redirect Examination

By Mr. Wolff:

Q. I might ask you, Mr. Berry, what the principle of this device you mentioned, just how does it work and dispose of the ice in the gutter?

A. By passing electrical current through a wire, the wire heating up, and in turn heating the gutter by heat given off from the wire in contact with the gutter.

Q. And despite the outside temperature it keeps the gutter warm so that the ice melts and flows off?

A. That is right.

Q. And doesn't freeze? A. That's right.

Q. And do you feel that that's related to the pitch of the roof at all?

A. The pitch of the roof would regulate the amount of water [201] that would run off in a rain storm. However, with snow and ice on a roof that is more or less of a function of the rate of melting.

Q. And I think you indicated these devices come in units? A. That is right.

Q. And it's a matter of placing the number of units required by the——

A. What would be necessary.

Q. The principle is the same in all situations, just a matter of the heat from the wires melting the ice? A. That is right.

(Testimony of Jack Berry.)

Q. Are there any factors that could exist in such an installation which would make the use of this device impossible?

Mr. Kelley: Well, if your Honor please, I object to that on the grounds it's not a proper hypothetical question, doesn't embody the proper facts from this record and testimony, it's speculative.

The Court: Will you read it, please?

(Pending question read by the reporter.)

The Court: I think that's an explanation of his opinion. I'll overrule the objection.

A. If the gutter was too small in the first place to handle the amount of melting that it would have, naturally that would be a consideration, or if the gutter wasn't—I doubt if the device would work very good if it was [202] non-metallic, if it wasn't a good conductor of heat.

Q. Do you know if those gutters are metal there, Mr. Berry?

A. I believe they are.

Mr. Wolff: That's all.

Recross-Examination

By Mr. Kelley:

Q. Mr. Upright——

The Court: This is Mr. Berry.

Q. Well, I assume he's still upright. You can only melt so much ice per hour with one kilowatt of heat, isn't that the situation?

A. That's right, if it all goes into heat. You

(Testimony of Jack Berry.)

said one kilowatt of heat. They don't measure heat in such units.

Q. And secondly, this wire that you mentioned must be cool enough so that it doesn't ignite the building; that's correct, isn't it?

A. That's right.

Q. Then in the third place, as you indicated a moment ago, the ice has to be in close contact with the wire, does it not? A. No.

Q. Oh, it doesn't? How far away can the ice be?

A. The resistance wires not only give off heat themselves, but they also tend to keep the temperature of the gutter above the air temperature.

Q. Yes, but I asked you how close does the ice have to be in [203] contact with the wire?

A. That depends on the temperatures.

Q. Well, how about the building we're talking about right there in exhibit 13?

A. That also depends on the amount of heat each one of the units has.

Q. Yes, and that in turn, the conditions are not inherent at all times? A. They vary.

Q. Yes, and you'd certainly admit, wouldn't you, Mr. Berry, that directing your attention to the roof as shown in exhibit 13 there, the ice could bridge over such a wire as you've been trying to describe, and the ice would be melted after bridging over, and would fall in large chunks that produce a greater hazard than you've described?

A. I don't believe so.

Q. You don't believe so. Well, have you given

(Testimony of Jack Berry.)

any consideration to the fact that, you might say, the ice would move on the roof because of the pitch, and then bridge over this wire that you've been talking about, and then fall off in large chunks below? Wouldn't that be possible for the nature and extent of the pitch of the roof?

A. Not any more so than they would before they had the wires in the gutter.

Q. Well, are you familiar with the Administration Building [204] down there, of the Bureau of Reclamation, at Coulee Dam?

A. Only with going in and out of it.

Q. I take it that you haven't made a personal examination there relative to the possibilities of electrical devices? A. No.

Q. No. Can you indicate to the Court where the downspout of that building is, on exhibit 12?

A. I don't think I know exactly where it is, unless it shows in the picture.

Q. In any event, you made no personal examination of any downspouts there?

A. Oh, I've seen water coming out of a downspout. There's one here by the entrance to the main store.

Mr. Wolff: Do you want to identify that for the record, Mr. Berry?

Mr. Kelley: Just a moment; I'm trying to conduct a cross-examination.

Mr. Wolff: The question should show the answer.

(Testimony of Jack Berry.)

The Court: Just one at a time. Where did you say you've seen a downspout?

A. The picture shows a downspout.

The Court: I wonder if you'd mark an X there and put your initials? I think it shows on the picture, but if you'll mark it there won't be any doubt about it.

A. This is the only way I have of showing a location, because [205] this indicates a downspout.

The Court: Put your initials there, so we'll know who put the mark there. All right, proceed, Mr. Kelley.

Q. (By Mr. Kelley): Yes; and then as I understand it you've observed Mrs. Phillips at these various social gatherings you've been to subsequent to the accident, is that correct?

A. I recall one social function.

Q. And as I understand it you helped move her hospital bed to her home? A. Yes.

Q. You and Mr. Phillips are, that's the proper term, brother Rotarians? You're quite frequently with the Phillips, to put it in a sentence, aren't you? A. Yes.

The Court: While you're on that subject, it isn't clear to me, Mr. Berry, you're employed by the Westinghouse Electric Company putting in those installations down there?

A. Yes.

The Court: Is Mr. Phillips employed by the same company?

A. No, he is the resident engineer there or the

(Testimony of Jack Berry.)

representative of the Newport News Shipbuilding and Drydock Company on the installation of the turbines that drive the generators.

The Court: Oh; what is it you're working on?

A. On the generators themselves. [206]

The Court: I see. I'm not too familiar with the detail of what's going on there. Do you have any further questions? That's all, then.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Kelley: Simply for the record, your Honor, in view of the fact of the witness' testimony that he made no personal investigation of the matters on which he sought to answer the questions propounded to him relative to the electrical devices, the defendant respectfully moves the Court to strike that testimony in toto.

The Court: It will be denied; exception allowed. Call your next witness.

THERA PHILLIPS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell the Court your full name, please? A. Thera Phillips.

Q. You're Thera junior? Your mother is the plaintiff in this action, isn't she?

(Testimony of Thera Phillips.)

A. Pardon?

Q. Your mother is the lady that brought the lawsuit? A. Yes.

Q. How old are you? A. 17. [207]

Q. Do you go to school? A. Yes.

Q. Where do you go to school?

A. Coulee Dam High.

Q. What year are you in? A. Senior.

Q. In January of 1949, what year were you in school? A. I was a freshman.

Q. You're familiar with the place where your mother fell, in front of the General Store Building?

A. Yes.

Q. How far is that from the school you were attending at that time?

A. Well, you go to the end of the store and across the street.

Q. Do you know the girl who testified here yesterday, what's her name? A. Shirley.

Q. Shirley Johnson? A. Yes.

Q. Did she go to the same school? A. Yes.

Q. And did you hear mention of another girl that reached your mother before Shirley, but had left, or she didn't know where she was?

A. You mean did I hear Shirley say that yesterday? [208]

Q. Yes. A. Yes.

Q. What was her name?

A. Eileen something. Eileen Simpson, is that it?
I don't know.

Q. Do you know who Eileen Simpson is?

A. No, I don't.

(Testimony of Thera Phillips.)

Q. Do you know whether she was going to your school at that time?

A. I don't believe so. I don't know her.

Q. Do you think you'd know her if she was going to your school? A. I believe so.

Q. Did you have any arrangement with your mother that morning as to when or where you would meet her during the day? A. Well, no.

Q. What were your plans about lunch, before the accident?

A. Well, she told me she was going to the hairdresser's, and usually before she leaves she prepares lunch for us, and if she isn't there we come in and eat and put the dishes up and leave, and so that's the same thing it was that day.

Q. Well, did you eventually get home for lunch that day? A. Yes, I was home.

Q. Where were you when you heard about the accident?

A. Mr. Neuman came down to the house for Daddy, and I was there. [209]

Q. This man Mr. Neuman came to find your father? A. Yes.

Q. And tell him about the accident?

A. Yes.

Q. Will you state whether or not your lunch had been prepared for you when you arrived?

A. Yes, it was there.

Q. Was it laid out for you?

A. Oh, yes; I was heating some soup.

Q. What I want to know is whether your mother had prepared your lunch in advance for you and

(Testimony of Thera Phillips.)

left it all out, or whether you had prepared it yourself. A. Yes, the things were ready.

Q. And what was the customary time at which you were arriving home for lunch?

A. Well, school was usually dismissed about 11:20 or 11:15, sometimes it's a few minutes after and sometimes it's a few minutes before, and so I usually got home no later than—sometimes it was as late as quarter to 12:00, though. It varies.

Q. What time did your mother expect you home for lunch that day, if you know?

A. Well, golly, I don't know just when we got in; we never know what time we'll get out until we leave school.

Q. And did you have any plans to meet her on the street corner? [210] A. No, I didn't.

Q. You were going home, and you did go home?

A. Yes.

Q. Did your father arrive home for lunch before you left? A. No, he didn't.

Q. Were you expecting your mother, when Mr. Neuman came? A. Yes, I thought it was her.

Q. Did you have any particular time when you expected to see your mother?

A. Well, I didn't know what time she'd be in; I mean it just varies on what she has done to her hair, and I thought she'd be there when I got there, and she wasn't, and so I thought she'd be there in just a few minutes, and when Mr. Neuman came I thought it was her.

Q. Did the fact your lunch was all set out for

(Testimony of Thera Phillips.)

you indicate anything to you as to when your mother would be there?

A. Well, no; when she goes to get her hair fixed or anything like that she usually fixes lunch for me, because she doesn't know just how much time I'll have for lunch.

Q. Well, Thera, when did you first see your mother after she fell?

A. Well, Mr. Neuman came for me and we went back to the store and she was in on the floor of the grocery department.

Q. Did you go with Mr. Neuman?

A. Yes, I did. I left a note for my father. [211]

Q. And you saw her first, after the accident, on the floor of the store? A. Yes.

Q. Will you state her condition when you saw her first? A. You mean how she was laying?

Q. Yes.

A. Well, she was flat on her back, and I believe Shirley was holding her head up, and she kept complaining of her ankle, and I asked her if the doctor had been called or Daddy had been notified, and she said yes, but she was in great pain. There were tears in her eyes. She wasn't exactly bursting out crying, but she was awful close.

Q. Had the doctors arrived when you got there?

A. No, I was there it seemed ages, but I don't suppose it was too long, and both of the Wileys came.

Q. Were you there when she was carried out of the store? A. Yes.

(Testimony of Thera Phillips.)

Q. Did she suffer any when she was carried out of the store?

A. She was suffering all the time. She just complained of great pain in her leg and ankle. I said, "What does it feel like?" She said, "It feels numb; I think it's broken." I don't remember what I said, but she was in awful pain.

Q. Did she indicate to you she was having difficulty with any other part of her body?

A. No, she didn't, except she did tell me she felt she was all [212] right except "I wish they would get those coats off my legs," and I said, "They haven't put any on there yet."

Q. Were there any people around there at the time she was on the floor? A. Oh, yes.

Q. How many people?

A. Jeepers, I don't know; quite a crowd.

Q. You mean two or three people, or 20, or 30?

A. Well, I had to push my way through to get in there; I don't know how many.

Q. Were they all near your mother, or just scattered around the store?

A. No, they were looking at mother. I don't remember just who they were. They were all trying to do something.

Q. And do you know what activities your mother engaged in before she fell?

A. Well, she was in Eastern Star, and she was mother advisor at Rainbow, and she was a member of the Rebecca Lodge and the League of Women Voters. She was constantly doing something.

(Testimony of Thera Phillips.)

Q. Did she continue those activities after the fall?

A. Well, she still belongs, but she doesn't participate.

Q. She doesn't participate now?

A. Not as much as she used to.

Q. Why doesn't she participate now? [213]

A. Well, up where they have Eastern Star and Rainbow it's difficult for her to sit still very long, her ankle pains her, especially when she's on it, and it's very difficult for her to get back and forth because she can't drive.

Q. Have you seen her try to drive the car?

A. Yes, I have.

Q. What happens?

A. We don't go anywhere, because we can't. I mean she can't put any pressure on her foot at all.

Q. Have you seen her try to put pressure on?

A. Yes, I have.

Q. What happens?

A. Do you mean in the car, or just try to put pressure on?

Q. What happens when she tries to drive the car? A. She just can't.

Q. Does she say anything or do anything?

A. She just kind of groans and tears start to her eyes every single time.

Mr. Wolff: May we, your Honor, break into the testimony of this witness to present Dr. Wallace, who is here?

The Court: Yes. I thought Dr. Wallace was coming at 11:00.

Mr. Wolff: Well, we expected him, but he's here now.

The Court: Well, I'll have to suspend at [214] 12, because I have another hearing at 1:30. You can proceed with him, if you wish, as far as you can go.

(Whereupon, the witness Thera Phillips was temporarily excused from the witness stand.)

GEORGE T. WALLACE

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your full name, please, Doctor? A. George T. Wallace.

Q. You're a regularly licensed physician and surgeon here in Spokane? A. I am.

Q. You attended medical school and received a degree as an M.D.? A. Right.

Q. Where did you attend school, Doctor?

A. University of Chicago.

Q. When did you received your degree as an M.D.? A. 1938.

Q. Have you practiced your profession since that time? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. Tell the Court where you've practiced since that time, Doctor. [215]

(Testimony of George T. Wallace.)

A. Well, I trained, of course, at the University of Chicago in orthopedics, and later at Mayo Clinic, and then I have four years as chief of orthopedic section in the Army and Navy General Hospital, Hot Springs, Arkansas, and since 1946, I've been practicing orthopedics in Spokane.

Q. You, I take it, then, specialized in orthopedics? A. Right.

Q. Will you explain to the Court what orthopedics is or are?

A. Orthopedics is that branch of medicine which deals with diseases and injuries of the bones and joints.

Q. Are you connected with any of the hospitals in this community, Doctor? A. I am.

Q. Which of the hospitals?

A. I'm on the staff of all three.

Q. Do you recall Mrs. Thera Phillips?

A. I do.

Q. Have you examined Mrs. Phillips?

A. Yes, sir.

Q. When did you first see Mrs. Phillips?

A. I can't tell you the exact date when I first saw her. The last time I saw her was March 21.

Q. Did you have occasion to make a casual examination of her here in the hall before you came in the courtroom? A. Yes, sir. [216]

Q. Before that you saw her in your office on the 21st of March of this year? A. Right.

Q. What examination did you make of Mrs. Phillips in March of this year?

(Testimony of George T. Wallace.)

A. The examination was limited to the findings in the right lower extremity.

Q. What did you find, Doctor?

A. The measurements of the calves and ankles are the following: Right, $14\frac{3}{4}$, the left, $15\frac{3}{4}$; that is the calf.

Q. You mean that her right calf was one inch smaller than the left?

A. Larger—smaller, that's right.

Q. The right calf was smaller? A. Yes.

Q. And it's the right ankle that was injured?

A. Yes.

Q. So there has been some, would you say atrophy, of the calf of the leg? A. Right.

Q. What are the ankle measurements?

A. The ankle measurements, on the right $10\frac{1}{2}$, and on the left, $9\frac{3}{4}$. The——

Q. Just a moment, please. That indicates, does it, Doctor, that the ankle that was injured—— [217]

Mr. Kelley: If the Court please, just let the Doctor testify; ask him what it indicates, for the sake of time.

The Court: Well, I think unless it's something that requires explanation, it's obvious that the right is $\frac{3}{4}$ of an inch larger than the left, is that correct?

Q. (By Mr. Wolff): The right ankle is larger?

A. Not quite—yes, that's right.

The Court: Well, I think you may let him give the measurements, and give his testimony, unless it's something that isn't easy to understand.

(Testimony of George T. Wallace.)

Q. (By Mr. Wolff): From $9\frac{3}{4}$ to $10\frac{1}{2}$?

A. Right.

The Court: Isn't that $\frac{3}{4}$ of an inch larger?

A. Yes; I'm sorry. The patient lacked 40 degrees of complete plantar flexion, and 10 degrees of complete dorsal flexion of the ankle, that is, downward movement was limited 40 degrees as compared to the normal uninvolved left ankle, and upward movement limited 10 degrees. The arterial pulsations were normal. There was very little subastragalar motion.

Q. What does that mean?

A. Sideward motion of the heel.

Q. There was very little of that motion?

A. Right. Do you want me to go ahead with the X-rays? [218]

Q. I would like you, doctor, if you can, to explain as fully in layman's language each of your findings so that we understand fully what you mean.

A. I think you can summarize it by saying there was atrophy of the musculature of the calf, the ankle was swollen, and there was limitation of motion both downward, upward, and sideward.

Q. Did you have occasion to examine X-rays of Mrs. Phillips? A. I did.

Q. Do you have them here?

A. I do not have them here.

Q. Can you state what you found from the X-rays?

Mr. Kelley: Oh, I would think just to limit the

(Testimony of George T. Wallace.)

extent of the record, that would be improper as not the best evidence.

The Court: I doubt if that would be permissible unless the X-rays are available for examination by the other side.

Mr. Wolff: Is it the Court's ruling that question is improper?

The Court: I don't think you should be permitted to testify to what the X-rays show unless they're produced, at least for inspection of the other side.

Q. (By Mr. Wolff): Are you able to determine, Doctor, whether or not there is any permanent disability in Mrs. Phillips' [219] ankle?

A. Yes.

Q. What is your opinion in that regard?

A. I thought there was very definite disability, permanent.

Q. Do you feel that her condition will improve, Doctor? A. I doubt it.

Q. Now, I believe you stated that you found there had been a break; did you so state?

A. Yes, sir.

Q. Can you state the nature of the injury itself in that ankle?

A. The ankle is supported by what we call the innter malleolus on the inside, and the exter malleolus on the outside, in lay terms.

Q. Would you be able to demonstrate or state more clearly in layman's language what that means?

A. Well, the two bones one feels when he puts

(Testimony of George T. Wallace.)

his hand on the inside and the outside of the ankle are the supporting bones, the malleoli. Both of these were fractured and entered the joint surface of the ankle.

Q. Was there any dislocation?

A. Not the films that I reviewed.

Q. Are you able to state whether the break that you learned of was present in a weight-bearing joint or not?

A. Yes, sir, it is a weight-bearing joint, and that's why I [220] believe the condition will gradually become worse from the standpoint of a traumatic arthritis as she gets older.

Q. Do you know what Mrs. Phillips' weight is?

A. I don't know exactly, but I do know that she is heavier than——

Q. I believe she testified 240 pounds.

A. Yes, sir.

Q. Is that about right from what you found?

A. Yes, sir.

Q. And are you able to state whether a person of that weight is, in your opinion, apt to have more trouble with a weight-bearing joint than a person of lighter weight?

A. I'm certain that the added weight would lead to further diasability.

Q. Do you know what Mrs. Phillips' complaints were at that time, Doctor, when you examined her in March?

A. Yes, sir.

Q. Will you state what her complaints were?

(Testimony of George T. Wallace.)

A. Pain on walking; swelling of the ankle, and limitation of motion, stiffness.

Q. Did she indicate whether changes of weather had any bearing upon her? A. Yes.

Q. What indication did she give as to that?

A. She stated that damp weather aggravated her symptoms. [221]

Q. From your findings would you state whether or not in your opinion these complaints were justifiable?

A. Yes, I think they would be justifiable.

Q. Is there any treatment that can be given to assist Mrs. Phillips at this time, in your opinion?

A. Well, of course reduction in weight would help. One has to confine her activities to the tolerance of the ankle joint, in other words, not walk excessive distances. Rarely we prescribe a brace to make the weight borne below the knee instead of in the ankle proper. At this time I don't think the severity of the changes in the ankle is enough to warrant an ankle fusion, stiffening the ankle and stopping all motion surgically.

Q. Is that the procedure that is sometimes followed in a case of this type?

A. If the disease, that is, the traumatic arthritis, progresses to a point that the patient is markedly limited, yes, I think that should be done.

Q. You don't feel this condition has reached that point at this time? A. I do not.

Q. Do you feel in your opinion that it might sometime reach that point?

(Testimony of George T. Wallace.)

A. I don't believe it will.

Q. Doctor, we have a copy of a report from Dr. Smick, who [222] examined Mrs. Phillips, and he indicates that he found some osteo-arthritic changes. Will you state whether or not you feel there are arthritic changes in Mrs. Phillips' ankle joint?

Mr. Kelley: I object to that, if your Honor please.

The Court: I think I'll have to sustain the objection to the form of the question. I can't properly consider the report of any doctor who isn't here to testify. You can ask him the straight-out question if he found anything of the sort.

Q. (By Mr. Wolff): Let me ask you, Doctor, whether you found any arthritic changes in that ankle?

A. I did not find any evidence from an X-ray point of view that there were arthritic changes.

Q. That was in March of 1951? A. Right.

Q. Now, when you examined Mrs. Phillips here today, of course it was casual, but was there any change from the condition you found when you examined her on March 21?

Mr. Kelley: With respect to what, if your Honor pleases?

Q. As respects the injury to this ankle.

A. The ankle is still swollen and there is still the atrophy of the calf.

Q. Did you measure the ankle and the calf today? [223] A. Yes, sir.

(Testimony of George T. Wallace.)

Q. Do you know what the measurements were today as compared to March?

A. The right calf, $14\frac{3}{8}$; the left calf, 16; the right ankle, $10\frac{1}{4}$, the left ankle $9\frac{7}{8}$.

Q. Were there any other changes than those that you observed, today? A. No, sir.

Mr. Wolff: You may inquire.

The Court: You may proceed; we'll try to get through if we can.

Cross-Examination

By Mr. Kelley:

Q. Doctor, when was the first time that you examined Mrs. Phillips?

A. I don't know the first time. The second time was March 21.

Q. Well, can you give us——

A. It was about six weeks before that, I think.

Q. The first time you examined her was about six weeks before March 21? A. I believe so.

Q. And were you called as her attending physician? A. No, sir.

Q. Then you haven't been called as her attending physician at any time? [224]

A. No, sir; no treatment.

Q. Do you happen to know who her attending orthopedic physician was at that time?

A. I believe it was Dr. Adams. No, I beg your pardon; it was a doctor in one of the smaller towns west of here, and then later Dr. Adams.

(Testimony of George T. Wallace.)

Q. Did you consult with Dr. Adams about Mrs. Phillips? A. No.

Q. And I take it he didn't give you any of his data or reports of investigation; and as you stated a moment ago, your examination was limited to findings in the right lower extremity, as you expressed it? A. Right.

Q. And——

A. And the left, of course, for comparison.

Q. And where was your second examination of March 21, 1951, held, Doctor?

A. In my office.

Q. That's in the Paulsen Building here in town?

A. Right.

Q. And about how long did it take?

A. Well, I would say twenty minutes.

Q. And then the third examination was the one you referred to as the casual examination out in the hall? A. Yes. [225]

Q. Was that subsequent to the time when I first saw you come in the door?

A. Just subsequent.

Q. And took about how long?

A. Oh, four minutes or five minutes.

Q. There is in evidence in this case, Doctor, for your information, a cancelled check to the Associated Anesthesiologists. A. Yes.

Q. Did you happen to send Mrs. Phillips to them? A. No.

Q. Is it possible, did you in the course of your examination send Mrs. Phillips to any other doctors

(Testimony of George T. Wallace.)

of the same type who could administer, what do they call that, sodium penathol? A. No.

Q. Did you administer sodium penathol?

A. No.

Q. I was wondering, if you had, you would be able to detect whether or not the patient can move her ankle sideways or flex her toes and so on?

A. You mean under sodium penathol?

Q. Yes.

A. Well, that's a very difficult question to answer. It has been used a lot by psychiatrists and so forth to detect [226] malingering.

Q. Yes; that is one of the recognized methods of detecting malingering, isn't it?

A. Yes.

Mr. Wolff: What was that word again, if I can have it repeated?

The Court: Malingering.

Mr. Wolff: Oh, yes.

Q. (By Mr. Kelley): And I suppose to a certain extent you had to depend upon what Mrs. Phillips told you subjectively as to her condition of her ankle?

A. Well, you have to evaluate the history, but of course the atrophy and the swelling are positive findings. The limitation of motion which I mentioned is passive motion, not active; in other words, I didn't ask her to show me how much she could push the foot down; that is actually how much I could push it down.

(Testimony of George T. Wallace.)

Q. Then you had an opportunity to observe that her reflexes are normal? A. Yes.

Q. And would you say her lower extremities are equal in size? A. No.

Q. Just to get clear in my own mind, Doctor, as I understand it there are three bones which enter into the formation of the ankle joint, are there not, the tibia and the fibula [227] and the ankle joint, or what do you call it, the astragalus, those are the three bones? A. Yes.

Q. Now, in this case, from your examination, could you tell whether the fibula was broken?

A. Yes, the X-rays showed a healed fracture when I saw it.

Q. Was that the fibula?

A. Yes, healing fracture of the fibula as well as the internal malleolus.

Q. And the treatment of this type of fracture, Doctor, briefly, is just the application of a suitable splint until the swelling subsides, and then encasing the limb in a plaster of paris cast, isn't that it, generally?

A. Well, they have to be reduced. If there's any displacement of the malleoli they have to be reduced to restore the ankle.

Q. I understood you to say there was no dislocation.

A. I didn't know; I didn't see the original films.

Q. But in general, if there's no displacement, in general a cast and immobilization, and time does the rest. Are there any objective symptoms of pain now? A. Yes.

(Testimony of George T. Wallace.)

Q. Well, you would say, wouldn't you, Doctor, that there isn't more than a permanent partial disability of 5 per cent as compared to a total disability? [228]

A. Total disability of the entire body, you mean?

Q. Yes. A. I would say from 5 to 10.

Mr. Kelley: I think that's all.

Redirect Examination

By Mr. Wolff:

Q. Doctor, it's alleged in this case that there was a dislocation. I believe you testified that you were not able to tell, because you didn't see the original X-rays. Assuming that there was a dislocation, in your opinion would that justify more pain and permanent disability than if there had not been a dislocation?

Mr. Kelley: I wouldn't feel that that would be a proper hypothetical question, if your Honor pleases; it doesn't embody the facts that are in this record.

The Court: Let's see; read the question.

(Pending question read by the reporter.)

The Court: I'm not sure; is there any evidence of dislocation here?

Mr. Wolff: It's alleged, and we intend to submit evidence of it.

The Court: Well, I'll let him answer, since he's here, but it's understood if there isn't any evidence of dislocation I'd have to disregard it.

(Testimony of George T. Wallace.)

Mr. Wolff: Oh, yes.

A. If there is dislocation there's definitely more injury to [229] the ankle, in that the ligaments are torn and the support of the ankle joint is considerably less than if the bones are simply cracked.

The Court: I think the question was whether there would be more pain.

Q. (By Mr. Wolff): Yes.

A. More pain and more disability, yes.

Mr. Kelly: Just for the record, I move to strike the answer in toto for the reasons hitherto urged.

The Court: Well, it's tentatively admitted. The record may show the objection.

Mr. Kelly: I was afraid I wouldn't move when he failed to produce other evidence.

The Court: All right, go ahead.

Q. (By Mr. Wolff): Assuming the same facts, Doctor, in your opinion would that provide a more permanent disability than if there had not been a dislocation? Is it more likely to provide a permanent disability than if there is not a dislocation?

Mr. Kelley: Your Honor understands for the record my objection goes to this whole line of questioning?

The Court: Yes, that's understood.

(Pending question read by the reporter.)

A. I believe that's true.

Mr. Wolff: That's all. [230]

The Court: Any other questions?

Mr. Kelley: No.

The Court: That's all, then, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: As I have stated before, I have this other matter coming up at 1:30, so that the trial of this case will be suspended until 2:30 this afternoon.

(Whereupon, at 12:10 o'clock p.m., the Court took a recess in this cause until 2:30 o'clock p.m.)

Thursday, April 12, 1951

THERA PHILLIPS

a witness called on behalf of the plaintiffs, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Wolff:

Q. Can you tell us, Thera, about your mother's activities around the home, whether there's been any change in those since the accident?

A. Quite a bit.

Q. Tell us in detail what you can about that.

A. Well, before the accident she did just everything there was to be done, and now she can't wash or iron or cook or clean or anything like that, now. I mean if it has to be done my sister and I do it. The laundry has to be sent out; she does a few things but not very much, [231] because she can't stand up long enough, and she tires too quickly.

(Testimony of Thera Phillips.)

It's up to us now. She cooks once in a while, but not constantly like she used to.

Mr. Wolff: You may inquire, Mr. Kelley.

Mr. Kelley: I didn't have any questions.

(Whereupon, there being no further questions, the witness was excused.)

ERNEST W. NEUMAN

called as a witness on behalf of plaintiffs, being first duly sworn testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you tell your full name, please?

A. Ernest William Neuman.

Q. Where do you live, Mr. Neuman?

A. I live in Electric City.

Q. And what's your occupation?

A. Dairy products distributor.

Q. Where do you distribute dairy products?

A. In the Coulee Dam area.

Q. Are you familiar with the building known as the General Store Building at Coulee Dam?

A. I am.

Q. And are you familiar with the sidewalk around the north side of the building?

A. I am.

Q. Do you know where the entrance to the mezzanine stairway [232] is on the north side of the building?

A. Yes.

(Testimony of Ernest W. Neuman.)

Q. Do you have any occasion in your business to travel that sidewalk? A. I do.

Q. Did you travel that sidewalk on the 28th of January, 1949? A. Yes.

Q. I presume from your description of your work that you deliver milk from store to store or house to house, milk and other dairy products?

A. Yes.

Q. Is that a daily activity of yours? Do you do it every day?

A. Monday and Wednesday and Friday at Coulee Dam and down the river, and Tuesday, Thursday and Saturday up above the dam. Occasionally there's a delivery on the alternating days.

Q. Did you have occasion to deliver milk up in this General Store Building area on the 28th?

A. Yes.

Q. Did you have occasion to know the condition of the sidewalk in front of the doorway to the mezzanine that day? A. Yes.

Q. What time were you there, Mr. Neuman?

A. I was there approximately at 11:30.

Q. In the morning?

A. In the morning. [233]

Q. Do you know whether that was before or after Mrs. Phillips fell?

A. I drove up there, and I saw Mrs. Phillips lying on the ice.

Q. So you reached the scene as Mrs. Phillips was lying on the ice? A. Yes.

(Testimony of Ernest W. Neuman.)

Q. And what was the condition of the ice at that point and at that time, Mr. Neuman?

A. Well, there was ice, and it was slippery.

Q. Can you state whether it was smooth ice or bumpy ice? Describe it as best you can.

A. Well, it was bumpy ice. The nature of the ice was somewhere around between two and three feet from the edge of the building; there was a raise of approximately five inches, and then it tapered out to about two or three feet or more toward the curb.

Q. This raise of about five inches that you mentioned, was that in any kind of a line, or was it just in one pile?

A. It was in a line parallel with the eaves, or, well, what would you call it. It wouldn't be perpendicular. That would be perpendicular with the eaves, wouldn't it?

Q. You mean it was right under the point——

A. It was under the point of where the eaves——

Q. Extended? [234]

A. ——extended.

Q. About how far out from the edge of the building would you say that was?

A. Oh, I didn't measure it, but it's something over two feet.

Q. And how far did that ridge of ice five inches high extend east and west along the sidewalk?

A. Well, the five inch part, perhaps was three or four feet, and altogether there would be about

(Testimony of Ernest W. Neuman.)

five or six feet of the approximately same amount of raise. It may have been more, I don't know; I didn't go into that.

Q. Was it possible for a person to come out of the mezzanine stairway door and not walk upon this ridge of ice? A. No.

Q. Do you know whether water was dripping from the roof in front of that door at that time?

A. I don't know.

Q. Are you able to state what caused this ice on the walk at that point? A. I don't know.

Q. Do you know whether there were icicles hanging from the roof at that point at that time?

A. I don't know.

Q. Do you know how long the walk had been in that condition prior to the fall?

A. Well, most of the winter there was ice on the walk. It [235] might have been cleaned off once in a while, but it was still slippery.

Q. I believe you indicated you were up that way on Monday, Wednesday and Friday?

A. Yes.

Q. Do you know what day it was that Mrs. Phillips fell, on the 28th, was that a Monday, Wednesday or Friday?

A. I think that was on a Friday.

Q. Do you know the condition of the walk on the Wednesday before that? Was it the same?

A. Well, I didn't see anyone fall on it, so I wasn't particular about it.

Q. You don't know, then?

(Testimony of Ernest W. Neuman.)

A. I don't know.

Q. All right. Do you know whether or not Mrs. Phillips was suffering any pain at the time you found her on the ice?

A. Yes.

Q. By the way, was anyone there before you arrived?

A. There was someone there.

Q. Do you know who it was?

A. No, I don't know who they were.

Q. State what her position was upon the ice.

A. She was lying on the ice. Her ankle was mostly on the ridge, and to the slope toward the building was most of the rest of her body. [236]

Q. Was she lying on her side or back?

A. I can't recall that.

Q. Do you know whether any part of her body was in direct contact with the ice, without any clothing between her and the ice?

A. I don't know that.

Q. Do you know how long she lay on the ice before she was moved?

A. I don't know that.

Q. Did you leave the scene before she was moved?

A. Yes.

Q. Do you know anything about her social activities before she was hurt?

A. Yes.

Q. What activities did she have, Mr. Neuman?

A. Well, one of the activities that I know she has, she used to come up to Star.

Q. Eastern Star?

A. Eastern Star, and then after that she was

(Testimony of Ernest W. Neuman.)

—well, any time I've been there after that I haven't seen her.

Q. Where did you go when you left the scene of the accident?

A. Well, apparently I was one of the first ones there that she knew, and she asked that I go and find her husband or her daughter, and she was in great pain then, and someone was trying to help her out, as everyone would like to do, [237] and I went down to the house, and Mr. Phillips wasn't home, so I brought one of the girls up, and by the time I got back, why, then they had moved her in the store, and I saw Mr. Phillips walking up the sidewalk toward the entrance to the Co-Op Store.

Mr. Wolff: You may inquire.

Cross-Examination

By Mr. Kelly:

Q. Mr. Neuman, how long have you lived in Electric City?

A. Well, we—it was the year following the war we moved there.

Q. 1946?

A. Oh, something like that. I don't remember the date.

Q. You were there a couple of winters, at least, before this accident to Mrs. Phillips?

A. Yes.

Q. And this ice that you've been describing, that was right in front of the mezzanine door going up to the Dumas beauty salon?

A. Yes.

(Testimony of Ernest W. Neuman.)

Q. And as shown there in exhibit 12, the door of the mezzanine in that picture?

A. That's it.

Q. That's the door we're talking about.

A. Yes.

Q. And by the way, did you notice the snow piled up on the curb there of the sidewalk going in a general easterly and [238] westerly direction on Roosevelt Avenue?

A. No.

Q. I see; and you didn't notice any runways to go across the sidewalk in that vicinity of the door from the store, anything of that sort?

A. What do you mean?

Q. Well, you didn't notice any ridges where people had crossed through the snow to go across the sidewalk that you have described?

A. I don't know whether there was any snow on the sidewalk, even.

Q. But this ice that you're talking about, that was out two or three feet from the building, as I understand?

A. Approximately.

Q. Then it rose some five inches?

A. Yes.

Q. And then it went in the direction of the curb a matter of three or four feet?

A. Yes, it sloped both ways, toward the building and also toward the curb. I don't know whether it was three or four feet, or it might have been only two feet.

Q. And this ridge was at least as wide as the door into the mezzanine?

A. Repeat the question, please.

(Testimony of Ernest W. Neuman.)

(Pending question read by the [239] reporter.)

A. I didn't get that then.

Mr. Wolff: You didn't understand?

A. I didn't understand.

Q. The ridge you're talking about was at least as wide as the door to the mezzanine, wasn't it?

A. As wide as the door.

Q. As wide as the doorway; w-i-d-e.

A. What do you mean by it being wide?

Q. That's what I'm asking you.

The Court: Long, maybe you're talking about.

A. No, it wasn't as wide as the doorway.

Q. How wide was it?

A. It may have been two or three inches wide.

Q. Oh, and it ran in a direction toward the street, is that it? A. No, sir.

Q. Did it go—run east and west, did it?

A. It ran east and west.

Q. I see.

A. Parallel with the building.

Q. Not quite as wide as the doorway?

The Court: I think the confusing thing is, you're using the word wide, he's thinking of it being long. I suspect that's the difficulty. I think Mr. Kelley is asking how long it extended along the walk. Was it the full [240] width of the doorway?

Q. (By Mr. Kelley): Yes, was it the full width of the doorway?

A. Yes, it was the full width of the doorway.

Q. Was it any wider than the doorway?

(Testimony of Ernest W. Neuman.)

A. I can't understand what you mean by wide.

Q. How wide is this doorway from that side to that?

A. I don't know.

Q. What's your best estimate?

A. All right, we'll say four feet.

Q. All right, was this ridge you're talking about four feet?

A. The ridge was not four feet wide.

Q. How wide was it?

A. Approximately two or three or four inches on top, and it sloped down.

The Court: I think what Mr. Kelley is asking you, as I understand it, the ridge extended up and down along the walk, didn't it? Is that east and west?

A. The walk is east and west.

The Court: Was the ridge as long as the door is wide?

A. He's talking about a wide ridge.

The Court: No, I think what he wants to know is whether it extended as far along in length as the door is wide.

A. Yes. [241]

Q. (By Mr. Kelley): So there wasn't any question but what anybody going over the ridge would have to see it if they were looking for it?

A. Whether they could see it?

Mr. Kelley: Read him the question, Mr. Taylor.

(Pending question read by the reporter.)

Mr. Wolff: If you don't understand, just say so. Do you understand?

(Testimony of Ernest W. Neuman.)

A. No, I don't understand.

Q. Well, what don't you understand about it?

A. Whether anyone could see it or not.

Q. Well, it was there right in front of you as you went into the mezzanine. You saw it, did you?

A. Yes, I saw it.

Q. You walked over it?

A. No, I didn't walk over it.

Q. Well, I understood you to say, I may be wrong, because I have difficulty following you, but didn't you say it wasn't possible to come out of the mezzanine door without going over this ridge of ice?

A. That's right.

Q. Yes.

A. Unless you crawled up along the building either way.

Q. Oh, could you do that?

A. If you wanted to, if you had skates on, I suppose. [242]

Q. But you could go between the ridge and the building, could you? A. I don't know.

Q. Well, what did you mean just a minute ago?

A. Anyone can go most any place that they want to go.

Q. I understand, but was there sufficient space for a person to walk between that ridge that you've described and the side of the building?

A. Not without being on ice.

Q. But they could go without being on the ridge, and still be on the sidewalk?

(Testimony of Ernest W. Neuman.)

A. They wouldn't be on the sidewalk if they were on the ice.

Q. All right, was there room between this ridge and the building for a person to walk down on the sidewalk on the ice, do you know that?

A. What was that?

Mr. Kelley: Read him the question, Mr. Taylor.
(Pending question read by the reporter.)

A. Well, I'll say I don't know.

Mr. Kelley: Well, if you don't know I'm sure I don't. That's all.

Mr. Wolff: That's all.

(Whereupon, there being no further questions, the witness was excused.) [243]

PATRICIA PHILLIPS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Tell the Court your name, please.

A. Patricia Phillips.

Q. Your mother is Thera Phillips, who brought this suit? A. Yes.

Q. Do you go to school, Patricia? A. Yes.

Q. What year are you in school?

A. Sophomore in Coulee Dam high school.

Q. You're younger than Thera, who testified here? A. Yes.

(Testimony of Patricia Phillips.)

Q. In January, 1949, where were you in school, what year?

A. I was in the 8th grade at the Columbia Grade School, which is across the river from the high school, in the main building.

Q. Do you know whether it snowed at Coulee Dam the morning of the 29th of January, 1949?

A. I don't know.

Q. 28th of January?

A. I don't remember it snowing that morning.

Q. You don't remember it snowing?

A. No.

Mr. Wolff: That's all; you may inquire. [244]

Cross-Examination

By Mr. Kelley:

Q. How old are you, Patricia?

A. 16 years old.

Mr. Kelley: Thank you. That's all.

(Whereupon, there being no further questions, the witness was excused.)

VIRGINIA SJOBERG

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wolff:

Q. Tell the Court your name, please.

A. Virginia Sjoberg.

(Testimony of Virginia Sjoberg.)

Q. Where do you live, Virginia?

A. Coulee Dam.

Q. Do you go to school? A. Yes, I do.

Q. What year are you in school?

A. Senior.

Q. Calling your attention to the 28th of January, 1949, were you living at Coulee Dam at that time?

A. Yes, I was.

Q. What year were you in school at that time?

A. Sophomore.

Q. Are you familiar with the General Store Building in Coulee Dam? A. Yes, I am. [245]

Q. And the doorway that leads to the mezzanine stairs? A. Yes.

Q. And the sidewalk on the north side of the building in front of the mezzanine door?

A. Yes.

Q. Do you know what the condition of the sidewalk was there at that point on the 28th of January?

A. It was icy.

Q. Can you describe the ice as you saw it?

A. Well, it was sort of bumpy; the water dripped on it and made little bumps in it, and it was awful slick.

Q. Did you have occasion to walk along the sidewalk at that point on the 28th of January, 1949?

A. Yes, I did.

Q. In front of the doorway to the mezzanine.

A. Yes.

Q. Did you have any difficulty walking there?

A. Yes.

(Testimony of Virginia Sjoberg.)

Q. Do you know whether the condition of the ice was the same prior to that morning?

A. Yes.

Q. How long was it the same?

A. Well, since quite some time, just about all winter, it was very slick.

Mr. Wolff: That's all, you may inquire. [246]

Cross-Examination

By Mr. Kelley:

Q. I take it, Virginia, you would walk over this sidewalk going to and from school?

A. No, I'd just walk out when I go to lunch.

Q. In any event, I suppose you go to lunch quite frequently?

A. Every day at noon, when I go to school.

Q. So you'd be going over the sidewalk almost every day? A. Yes.

Q. And as you've indicated for us, this sidewalk was icy? A. Yes.

Q. And ice is always slick, as you said?

A. Yes.

Q. And the rest of the students or some of the students go over the sidewalk with you at lunch, did they? A. My girl friend does.

Q. Your girl friend; who was that, one of the witnesses? A. Yes, Shirley Johnson.

Q. Oh, Shirley Johnson; oh, yes; and then in addition to you and Shirley I presume many people

(Testimony of Virginia Sjoberg.)

would use this same sidewalk we're talking about in front of the Mrs. Dumas Beauty Salon quite a lot all during January? A. Yes.

Q. How long have you lived down at Coulee, Virginia? A. About six years.

Q. This winter that Mrs. Phillips fell on the ice there where [247] we've been talking about, that was about the coldest winter that you experienced since you lived in Coulee, wasn't it

A. Uh huh.

Q. Do you mean yes, for the record?

A. Yes.

Mr. Kelley: I think that's all.

(Whereupon, there being no further questions, the witness was excused.)

HOMER C. PHILLIPS

one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn testified as follows:

Direct Examination

By Mr. Wolff:

Q. Will you state your full name, please?

A. Homer Clifford Phillips.

Q. Your wife is Thera Phillips? A. Yes.

Q. And you and she brought this action?

A. Yes.

Q. In January of 1949 were you and Mrs. Thera Phillips living together as husband and wife?

A. Yes.

(Testimony of Homer C. Phillips.)

Q. At Coulee Dam? A. Yes.

Q. When were you married, Mr. Phillips, you and Mrs. Thera [248] Phillips?

A. August 5, 1928.

Q. And you've lived together as husband and wife ever since then? A. Yes.

Q. When was the first you learned of Mrs. Phillips' fall?

A. On entering the hardware department of the store, right by the side of where the drug store partition is, one of the druggists met me there, I had went in the hardware store to make a purchase, and he asked me if that was my wife that had been hurt out front, and I says "I don't know" so he turned to the other druggist and says "Tommy, wasn't that Mrs. Phillips that was hurt out there?" and Tommy says "Sure," so that's the first I learned of it, and then I asked them where was she; "She's laying over on the floor in the grocery department," he says, so I went up there, and just as I got there the doctors were coming in with a stretcher—no, the two doctors were just putting her on the stretcher as I got there.

Q. Will you state how you and Mrs. Phillips were getting along together as husband and wife and what duties she performed, if any, as your wife prior to the accident?

A. Well, we as far as I know lived as two perfectly normal married people lived. We enjoy a lot of things in common, and I can't recall of any—well, I don't know—what [249] you'd call an argu-

(Testimony of Homer C. Phillips.)

ment or something; I don't know, there's different classifications of arguments, but we have prided ourselves on not leaving the house or something in an ill temper or something between us. I don't recall ever slamming the door and going taking a walk to cool off, as I have heard of people doing, and we are very proud of that. I think it's something to be proud of, anyway, and I think that I have a mighty fine cook. Of course, husbands are sometimes prejudiced, but I really enjoy my wife's cooking, and a lot of things, especially, being a southern boy, I like biscuits and I just like the way she cooks them, as well as baked beans with some molasses and bacon, I enjoy that, so since this accident my biscuits are kind of falling off a little bit.

The Court: If we keep this up the Court will have to adjourn early for dinner.

A. I beg your pardon, if I'm not answering the questions right or anything.

The Court: Go ahead, that's all right.

Q. Yes, I want you to tell what the relationship was between you and your wife prior to the accident.

Mr. Kelley: Would it shorten anything if we stipulated that it was an ideal marriage?

A. Well, I would consider that our marriage was an ideal marriage; I would. [250]

Q. Was there any change in those circumstances after this accident and as a result thereof?

A. Well, since this accident—she never has been

(Testimony of Homer C. Phillips.)

a lazy woman, I wouldn't call her lazy, she's an ambitious woman, but her activities in her home has been curtailed quite a bit since the accident, especially in the housework that normally a housewife does, and in keeping up the place she has to have quite a bit of assistance, and she just can't stay on her feet too long, to do quite a bit of things, and I have noticed in her disposition a little bit, if me or the youngsters kind of get out of line like we do sometimes, why, we get straightened out pretty rapidly. I didn't recall of her being maybe just a little bit picky before in her disposition. I think one of our biggest problems is the radio music. Something that the youngsters like, why, maybe that don't sound good to her and she wants it changed or shut off or something. That's one of the changes I've noticed.

Q. Any change in her over-all nature or disposition itself?

A. Well, being with your wife every day a person might not notice things as much as they would if they had seen them periodically, but I do think that different little minor things that annoys her now, I believe that that has been added on to her disposition.

Q. During the period that she was in the hospital who took [251] care of the household duties?

A. Well, it was between the youngsters and I, the two children and I.

Q. And when she came home from the hospital

(Testimony of Homer C. Phillips.)

was she at once able to resume her duties as a wife and mother?

A. No, she was in this hospital bed that we provided for her in the living room, she would be a little more comfortable there and have a little better outlook on the place; it was on the front of the building, and she stayed in that bed for several weeks, I don't recall the exact time, and of course she was unable to pick up her duties that she had had before.

Q. Is everything back to normal now except the biscuits?

A. Well, she has suffering and pain in her ankle, and she is unable to do the things that she did do before she was——

Q. What would you specify those are?

A. That would be housekeeping, cooking, and taking care of the place as a mother and wife.

Q. What about your activities outside the home; has there been any change in those?

A. Yes, there's been some changes in those to this extent, that we have enjoyed similar things prior to our marriage, and our tastes run along some together, and we enjoy fishing, going to movies, and going to certain meetings, and being with our friends, and since she has to go around [252] on a crutch or rather a cane, it's quite hard for her to go to the picture shows and go in between the seats with this cane; she don't like to be out in the public too much; it seems like—well, she says she's a large woman, she just hates to have to use the

(Testimony of Homer C. Phillips.)

darn thing to get around with, so we have curtailed our activities quite a bit due to some places necessitating using stairs and things which are very hard and uncomfortable for her to navigate.

Q. Had you and she actually gone stream fishing before this accident? A. Yes, sir.

Q. About how often would you go stream fishing with your wife?

A. Well, we usually made it on a Saturday or something like that. Maybe we would go and have a party maybe a couple of times a month for stream fishing, and probably sometimes in the evenings, the long evenings during the season, why, we'd go up to a lake and go boat fishing in the afternoon before it got dark.

Q. Have you been able to go stream fishing since her accident? A. No, sir.

Q. But she still goes boat fishing? A. Yes.

Q. I think your wife indicated something about western dancing.

A. Yes, we were members of the Coulee Dam Western Dance Club, [253] and of course that was prior to her accident, and of course since her accident she is unable to dance. We got a lot of pleasure out of that.

Q. Did you actually attend the functions of this dance club? A. Oh, yes.

Q. How often did that take place?

A. They met on Saturday nights; I believe it was every other Saturday night. I don't recall whether it was every Saturday night or every other Saturday night.

(Testimony of Homer C. Phillips.)

Q. How often did you attend those, you and your wife?

A. We went most every night that they had them.

Q. And has she been unable to attend them since?

A. We haven't been to any of them since.

Q. There's been some testimony here, Mr. Phillips, about her inability to drive a car. Does that have any bearing upon your enjoyment of your wife's services?

A. Well, to this extent; she could sometimes probably do an errand or something or go somewhere which I at the time would not be available, or if she happened to need the car she could take me wherever I needed to be at the time, and then use the car, if she could drive.

Q. Who does the shopping now?

A. Well, part of the shopping I do. The most of the shopping she does over the phone. What I mean, shopping, I go get what she calls up for sometimes, and sometimes it is [254] brought to the house, which is general.

Q. Did you have to do the shopping before the accident?

A. Well, I didn't necessarily have to, it wasn't that I had to, but sometimes I went with her and sometimes I didn't.

Q. Has the accident made any change in this shopping situation as far as you're concerned?

(Testimony of Homer C. Phillips.)

A. Yes, it has to that extent, that I do have to run to the stores more.

Mr. Wolff: I believe you may inquire.

Cross-Examination

By Mr. Kelley:

Q. Neither one of the girls makes biscuits, as I gather? A. No, sir.

Mr. Kelley: I guess that's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Wolff: At this time I would like to read into the record the deposition of Dr. Eugene D. Wiley.

The Court: Well, it may be published.

Mr. Wolff: I might say to your Honor that this deposition was taken upon notice, as is shown in the file. After the time had expired to serve cross-interrogatories, none were filed; at the request of counsel, however, we extended the time by stipulation, and none were then filed, and they were then submitted, and therefore there are no cross interrogatories. The [255] deposition of Dr. Eugene D. Wiley having been published, we will now read from it into the record.

Deposition of Dr. Eugene D. Wiley, a witness of lawful age, taken on behalf of the plaintiffs in the above-entitled cause, wherein Homer C. Phillips, and Thera Phillips, husband and wife, are

plaintiffs, and United States of America is defendant, pending in the District Court of the United States, for the Eastern District of Washington, Northern Division, pursuant to the notice hereto, annexed, before A. G. Hess, a notary public in and for Woodbury County, State of Iowa, commencing at 3 p.m. on the 6th day of March, 1951, said deposition being taken on written interrogatories.

Mr. Hess (Notary Public): The record will show the production of the notice for the taking of the deposition of Dr. Eugene D. Wiley before me at this time and place, upon written interrogatories, said interrogatories being attached to the notice.

DR. EUGENE D. WILEY

the witness named in the annexed notice, being of lawful age, and being by me first duly sworn in the above cause as hereinafter certified, testified on his oath as follows:

Direct Interrogatories

Q.-1. What is your full name?

A. Eugene Dalby Wiley. [256]

Q.-2. Where do you reside?

A. Sioux City, Iowa.

Q.-3. How long have you resided there?

A. Aproximately fourteen months.

Q.-4. Where did you reside before that?

A. Coulee Dam, Washington.

Q.-5. What is your profession?

A. Physician, regular.

Q.-6. Have you ever been licensed to practice as

(Deposition of Eugene D. Wiley.)

a physician and surgeon in the state of Washington?

A. Yes.

Q.-7. When were you so licensed?

A. July 20, 1938.

Q.-8. Do you still have such a license?

A. Yes.

Q.-9. How long have you practiced medicine?

A. Since 1929.

Q.-10. Of what medical school are you a graduate?
A. University of Iowa.

Q.-11. What other study or training did you have?

A. Regular internship, Salt Lake City General Hospital; three years assistant to general surgeon, Creston, Iowa.

Q.-12. Where have you practiced your profession?

A. West Yellowstone, Montana; Creston, Iowa; Merville, Iowa; Coulee Dam, Washington; Vancouver, Washington; Sioux [257] City, Iowa.

Q.-13. How long did you practice at Coulee Dam, Washington?

A. From June, 1938, to August, 1942, and from January, 1946, to August 1, 1949.

Q.-14. Did you practice privately there?

A. Yes, from 1946 to 1949.

Q.-15. Did you operate that hospital for the Bureau of Reclamation?
A. Yes.

Q.-16. Explain the arrangement under which you practiced at Coulee Dam, Washington.

(Deposition of Eugene D. Wiley.)

A. I was lessee of the Coulee Dam Community Hospital, was chief surgeon of the Columbia Clinic with offices in the Coulee Dam Community Hospital.

Q.-17. As a part of your work have you had experience in the taking and reading of X-ray pictures?

A. Of the reading of X-rays, yes.

Q.-18. What experience have you had in that line?

A. I have been reading X-ray pictures all during my practice of medicine, but more especially the years from 1938 to 1949.

Q.-19. How many X-ray pictures have you taken and examined during the course of your practice?

A. That would be hard to say, exactly. I suppose possibly 5000. [258]

Q.-20. As part of your training and in actual practice, have you made a thorough study of the anatomy of the human body? A. Yes.

Q.-21. Do you know Mrs. Thera Phillips, the plaintiff in this case? A. Yes.

Q.-22. Did you attend and take care of, as attending physician, Mrs. Thera Phillips, the plaintiff in this case? A. Yes.

Q.-23. When did she first become a regular patient of yours, to the best of your recollection?

A. January 28, 1949.

Q.-24. Did you make a physical examination of her at that time?

A. Yes, and more especially the right ankle.

(Deposition of Eugene D. Wiley.)

Q.-25. Have you attended her regularly ever since?

A. From that date until August 1, 1949.

Q.-26. Did you have an occasion to examine her on or about January 28, 1949? A. Yes.

Q.-27. What was that occasion, if you know?

A. She was brought into my hospital suffering from an injured right ankle.

Q.-28. State the extent of the examination you then made.

A. The ankle was inspected, palpated, and X-rayed. [259]

Q.-29. Describe the method of examination and technique that you used in examining her.

A. The ankle was inspected, was palpated, and an X-ray picture of the right ankle was ordered.

Q.-30. Did you take X-ray pictures of her?

A. X-ray pictures were taken under my order and direction.

Q.-31. What kind of machine did you use?

A. That was a 100 milliamperere General Electric machine.

Q.-32. Was it in good working order?

A. It was.

Q.-33. What technique did you employ?

A. It was the regular technique which had been determined previously for this particular machine.

Q.-34. Who developed the film?

A. The X-ray technician in the X-ray department in my hospital.

(Deposition of Eugene D. Wiley.)

Q.-35. Did you examine the film after taking the X-rays? A. Yes.

Q.-36. Did the films correctly portray the tissue as well as the bony structure?

A. It showed the tissues and the bony structure as you would expect from a satisfactory film.

Q.-37. In your opinion, did the film correctly portray that portion of the body or anatomy which they purport to show and which you took? [260]

A. Yes.

Q.-38. From your study of the X-ray films, which you took, and from your own physiscal examination, did you form an opinion, based upon a reasonable medical certainty, as to what the diagnosis in this case was? A. Yes.

Q.-39. What was that diagnosis?

A. A tri-malleolar fracture of the right ankle with some displacement of bony fragments with considerable soft tissue swelling present.

Q.-40. Do you have any X-rays pertaining to Mrs. Thera Phillips? A. I do.

Q.-41. Will you take a pen and number each and every one of the X-rays separately, as follows: Eugene D. Wiley, M.D., Deposition Exhibit "1," Eugene D. Wiley, M.D., Deposition Exhibit "2," etc., etc.? A. I will.

(The X-ray films produced and referred to were marked respectively: Eugene D. Wiley, M.D., Deposition Exhibits 1 thru 8, for identification.)

(Deposition of Eugene D. Wiley.)

(Whereupon, the X-ray films were re-marked in this trial as Plaintiff's Exhibits No. 20 thru 27, inclusive, for identification.)

Q.-42. Identify each and every one of the exhibits you have just marked, so that we may understand what each one of them is and state also the date when each was taken. [261]

A. Deposition exhibit No. 1, a lateral view of the ankle, shows a tri-malleolar fracture with some displacement of bony fragments. Exhibit No. 2, is an anterior-posterior view of the ankle, shows considerable soft tissue swelling with no increase in the ankle mortise. Exhibits 1 and 2, were taken January 28, 1949. Exhibit No. 3, date of January 29, 1949, anterior-posterior view of the right ankle in a cast after reduction, shows excellent position of the bony fragments. Exhibit No. 4, was taken on the same date, January 29, 1949, a lateral view of the ankle, shows the ankle in a cast after reduction, in good position. Exhibit No. 5, taken on February 25, 1949, a-p and lateral views of the right ankle in the cast, continues to show excellent position with early bone repair. Exhibit No. 6, same reading as No. 5, taken on the same date, February 25, 1949. Exhibit No. 7, taken on March 18, 1949, anterior-posterior, A-P and lateral views of the right ankle after the removal of the cast, shows a good alignment with a moderate amount of bony repair. Exhibit No. 8, date of April 8, 1949, shows the A-P and lateral of the right ankle without a cast, shows good position

(Deposition of Eugene D. Wiley.)

and good union of the previously reported fractures.

Q.-43. You stated you diagnosed Mrs. Phillips' condition, now will you state what, if anything, you did to treat the [262] injury you found on January 28, 1949?

A. The patient was anesthetized, the fragments were manipulated and felt to be satisfactorily reduced, and a cast was applied from the base of the toes to the mid-thigh.

Q.-44. Please go into the treatment in considerable detail and go through its entire course up to the last time you examined Mrs. Phillips.

A. Well, I cannot specifically state, giving accurate dates, regarding all the details of this case, as the records are not at my disposal. I can from memory recite some of the important facts. Following the original manipulation and reduction of the fracture the patient was hospitalized for approximately two weeks, and was seen several times daily by me while in the hospital. As I recall the original cast was removed within a period of fourteen to twenty-one days, and a second cast was applied. The second cast was removed at approximately seven weeks from the time of the original injury, and during the whole five weeks of this period the patient was confined to her bed at home. At the end of seven weeks a new cast was applied, and I believe a walking iron was placed on the cast, and with the aid of crutches she was moving around the house in a limited fashion. This cast was left on for approximately [263] another two

(Deposition of Eugene D. Wiley.)

or three weeks, and was then removed. An elastic bandage was applied to the ankle, and the patient was instructed to walk with crutches with limited weight bearing on the right foot. As I recall there was considerable swelling and edema of the foot and ankle after the removal of the cast, and the patient complained of considerable pain on attempted weight bearing and limitation of motion in the ankle joint. The patient was instructed to use hot soaks, and alternating hot and cold soaks to improve the circulation in the right foot and ankle. She continued to complain of considerable pain, aggravated markedly by weight bearing with limitation of motion, which condition still persisted when she was last seen by me late in July of 1949.

Q.-45. When did you last examine Mrs. Phillips?

A. Some time during the latter part of July, 1949.

Q.-46. Was there any change in the condition as you have described it at the time of your last examination?

A. I have already described the condition of this patient at the time of the last examination in answer to interrogatory No. 44.

Q.-47. Have you an opinion, based upon a reasonable medical certainty, from your examination, treatment and study of the case, as to whether or not the condition of the right ankle joint as you have described it is temporary [264] or permanent in nature? A. Yes.

Q.-48. What is your opinion?

(Deposition of Eugene D. Wiley.)

A. Basing my opinion on my observation while I treated her and at the time I last saw her, I felt that the X-ray pictures did not completely portray the whole picture in regard to this patient. There was marked soft tissue injury at the time of the injury. After the removal of the last cast, as I have stated previously, there was considerable swelling, and the circulation in the foot and ankle region was interfered with somewhat. There was considerable limitation of motion of the ankle joint, and there was considerable tenderness in the region of the ankle joint. As the patient was quite heavy I was inclined to accept at face value the statement that the ankle was very painful with weight-bearing and limited her activities to a considerable degree. It was my opinion that the woman would have considerable permanent disability of the ankle at the time I saw her late in July of 1949.

Q.-49. Will you compare her condition as you found it before January 28, 1949, to what you found when you last examined her?

A. I had occasion to see Mrs. Thera Phillips at not infrequent intervals prior to January 28, 1949, as an [265] acquaintance and in a social way, and had never noted any lameness nor any restriction of her many activities nor any difficulty in her walking.

Q.-50. You are acquainted with what the fair, reasonable and customary charge in Okanogan County, Washington, is for the treatment of pa-

(Deposition of Eugene D. Wiley.)

tients, such as you have described, during the year 1949? A. Yes.

Q.-51. What is the fair, reasonable and customary value of such medical services as you rendered Mrs. Phillips over the entire period of time from January 28, 1949, when you undertook treatment, down to the time you last examined her?

A. Approximately \$125 to \$150.

Q.-52. Have you an opinion, based on a reasonable medical certainty, as to whether it will be necessary for Mrs. Phillips to continue under medical treatment? A. Yes.

Q.-53. What is that opinion?

A. It was my opinion she would need continued treatment and observation at the time I last saw her in July of 1949, and as I recall I referred her to an orthopedic surgeon in Spokane for future treatment.

Q.-54. Can you state whether or not Mrs. Phillips suffered as a result of this injury, during the period you were caring [266] for her?

A. Yes.

Q.-55. State in full and complete detail the extent of her suffering as far as you know.

A. The patient complained of almost continual pain in the right ankle from the time I first saw her on January 28, 1949, which was aggravated by weight bearing, and which prohibited any long period of weight bearing from the time of her injury on January 28, 1949, until last seen late in July of 1949.

(Deposition of Eugene D. Wiley.)

Q.-56. If Mrs. Phillips was a pianist, can you state whether she could use her right foot to operate the pedals of the piano after January 28, 1949?

A. As I recall the patient stated that she could not use the pedals of the piano using her right foot up to the last time that I saw her in the latter part of July, 1949.

Q.-57. Do you know whether Mrs. Phillips' condition after January 28, 1949, limited her daily activities? A. Yes.

Q.-58. State the full extent of the limitations, if any.

A. The patient was in the hospital from January 28th for a period of two weeks approximately. Following this she was in bed at home for a period of approximately five or six weeks. As I have previously stated following the removal of the last cast the patient was instructed to [267] use crutches and gradually increasing weight bearing using the right ankle. Because of the pain in her ankle, her weight probably being a contributory factor, all of her activities were markedly limited. During the latter period of time previous to and including the latter part of July when I was attending her she was attempting to use a cane, but without a great deal of success, as the pain in the ankle restricted her activities markedly. The condition as I have described above was the condition which existed at the time I last saw her in July of 1949.

Q.-59. If your answer to the last question was

(Deposition of Eugene D. Wiley.)

no, state how long this condition continued, if you know?

A. The condition I have described above was present when I last saw her in July of 1949, and what condition has existed since that time I do not know.

/s/ EUGENE D. WILEY, M.D.

Subscribed in my presence and sworn to before me by the said Eugene D. Wiley, M.D., on this 7th day of March, A.D. 1951.

[Seal] /s/ A. G. HESS,
Notary Public in and for the County of Woodbury,
State of Iowa.

My Commission expires July 4, 1951.

(Notary's Certificate at conclusion of Deposition.) [268]

Mr. Wolff: That's all.

The Court: Do you wish to offer the X-rays, then?

Mr. Wolff: Yes, I move their admission in evidence.

The Court: Plaintiff's identifications 20 to 27, inclusive, will be admitted.

(Whereupon, Plaintiff's Exhibits No. 20 to 27, inclusive, for identification were admitted in evidence.)

Mr. Wolff: Now, we had some exhibits that we haven't moved be introduced in evidence. There's the daily weather reports, I think they are identified as number 14, is that right?

The Clerk: Yes, they were identified on behalf of the defendant.

Mr. Wolff: As to plaintiff's identification 9, I think it was stipulated that it is a genuine document, and we move its introduction in evidence. The underlining is mine, by the way.

Mr. Kelley: Might I inquire what the purpose is?

The Court: Yes. Perhaps if I look at it I might get a better idea of what your discussion is here regarding it. All right.

Mr. Kelley: I thought the matter of the incorporation of Coulee Dam was covered by the pre-trial conference. In any event—— [269]

The Court: You offer it to show that the town is not incorporated?

Mr. Wolff: No, no, for the purpose of showing the second item I underlined there; doesn't it say that the Bureau exercises maintenance and controls the property, of everything in the community?

The Court: Yes, of such properties it operates.

Mr. Wolff: That's the purpose of introducing it.

Mr. Kelley: Object to any conclusion that the Bureau exercises all the incidents of ownership. That, of course, is one of the factors the Court has to pass upon.

Mr. Wolff: I think the government will have an opportunity to show that is not the fact, if it is not the fact. It's within their control to bring any of the people of the Bureau to show that information.

The Court: If this were a private corporation the letter would be admissible. I'm not too sure

about what the rule is where the action is against the government; the Tort Claims Act provides the government shall be liable under the same circumstances as an individual; whether that would apply to an admission by competent government officials I'm not sure, frankly. I'll admit it, reserving the right to pass upon whether it should be considered or not. [270]

(Whereupon, Plaintiffs Exhibit No. 9 for identification was admitted in evidence.)

Mr. Wolff: We now move the admission of plaintiff's identification 10.

Mr. Kelley: The defendant objects to the admission of exhibit 10 on the grounds that it's not competent, relevant, and immaterial in an action of this type; I assume that your Honor wouldn't admit it if we had a jury. I want to make the objection for the record, not just for the benefit of my client, but of the others mentioned therein.

Mr. Wolff: Of course it can't have a bearing upon anyone not a party to this action; only the party to this action.

The Court: I think the objection should be sustained. It wouldn't be competent if there were a jury here, and I'll instruct myself to disregard it in this case.

(Whereupon, Plaintiff's Exhibit No. 10 for identification was rejected.)

The Court: Is that all that you have so far as you know, Mr. Wolff? I might suggest it's time for

adjournment, and that will give you over the overnight adjournment to check up and see if you've omitted anything, and then if you haven't I presume you'll rest in the [271] morning, is that the situation?

Mr. Wolff: That's right, your Honor.

The Court: All right, the Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:35 o'clock p.m. the Court took a recess in this cause until Friday, April 13, 1951, at 10 o'clock a.m.)

Friday, April 13, 1951

(All parties present as before, and the trial was resumed.)

Mr. Wolff: Can you agree these may be admitted?

Mr. Kelley: Yes.

(Whereupon, Plaintiff's Exhibits Nos. 8 and 8-a to 8-h for identification were admitted in evidence.)

Mr. Wolff: We rest our case.

Mr. Kelley: Just for the record, your Honor please, the plaintiffs having rested, the defendant moves for a non-suit on the grounds there has been a total failure of proof to show there is any liability on the defendant the United States of America in this case, and specifically no evidence indicating any duty of the defendant towards these plaintiffs or a breach thereof, and the [272] second

ground of the motion is that the evidence as adduced not only shows no liability, but affirmatively shows contributory negligence on the part of the plaintiff Thera Phillips. I know the Court has pressing matters, so we would ask you to reserve ruling and perhaps we will renew our motion and take up the matter in argument.

The Court: I haven't anything else for the rest of this week, so you needn't hurry on that account, but I would like to see the lawsuit finished this week. As I have stated on former cases, and I think it's justified by the attitude of the Court of Appeals, that unless I'm very, very sure that a case should be terminated at the close of the plaintiff's evidence I prefer to hear the whole case and then pass on the questions involved, so if it goes up to a higher court it can be decided on the whole record, so I'll deny the motion and allow an exception. Proceed.

WILLIS E. SMICK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Willis E. Smick.

Q. You are a medical doctor?

A. Yes, physician and surgeon. [273]

Q. And where do you practice, Dr. Smick?

A. Spokane, Washington, 307 Fernwell Building.

(Testimony of Willis E. Smick.)

Q. And how long have you practiced in Spokane, Washington?

A. Approximately three and a half years.

Q. And you received a regular medical education from what school?

A. University of Oregon Medical School.

Q. And have you served internship?

A. Yes, one year rotating internship, Providence Hospital, Seattle, Washington.

Q. And how long have you been engaged in the practice of medicine in all?

A. Approximately nine years.

Q. And what branch of medicine have you practiced in that nine years?

A. Well, general practice.

Q. And did your general practice include the treatment of bone injuries and torn ligaments and X-raying of bones and torn ligaments and so forth?

A. I spent three and a half years as industrial surgeon for the Northwest Improvement Company, known otherwise as Roslyn-Cle Elum Beneficial Association, at Cle Elum, Washington, wherein I took care of 800 miners and their families, industrial surgeon there, and also during that three year period I was local surgeon for the Milwaukee [274] and the Northern Pacific railroad.

Q. Pursuant to our request did you examine the plaintiff, Thera Phillips?

A. I examined Mrs. Thera Phillips on September 11, 1950.

Q. And what type of examination did you cause

(Testimony of Willis E. Smick.)

to be made of Thera Phillips at that time, Doctor?

A. Well, I was mainly interested in this history of injury of the right lower extremity, in the ankle and foot region. However, I did check her over, her cardio-vascular system in regards to her blood pressure, and her weight, and a neurological examination.

Q. Now, will you state the result of your examination both as to her cardio-vascular system and general health and also in regard to—will you state that first?

A. Well, she came walking into the office using a cane and limping, and eye, ear, nose and throat examination didn't reveal any chronic evidence of traumatic head injury. The eye grounds didn't show any increased inter-cranial pressure, and the cardio-vascular examination, the blood pressure was found to be, and I repeated it a couple of times, 190 over 100, that's 190 systolic over 100 diastolic. The heart was regular, the chest was clear, the thyroid gland was not palpable, and abdominal examination, felt for the liver and and the spleen, but we didn't do any pelvic examination. The lower extremities were [275] essentially negative except that the circumference around the right ankle was $\frac{1}{4}$ inch greater than the left ankle. That's over the junction of the lower leg bones and the foot joint, there, internal external malleoli where the tibia and fibula articulate with the astragalus.

Q. Before we pass on to that, what would you

(Testimony of Willis E. Smick.)

say about her blood pressure being normal or abnormal?

Mr. Wolff: As of what date?

Q. As of the date of examination, September 11, 1950.

A. Well, I'd say that blood pressure was exceedingly high. I repeated it again yesterday. It's very pronounced, I would say it's on the borderline stroke condition, and I feel that with her weight of 236 pounds this might impair her ability to maintain her balance at times. These people who have a constant high blood pressure get dizzy spells quite frequently at times. Some of them don't have them very often, but then again that's a very common complaint of high blood pressure.

Q. What would you say as to her weight being normal or abnormal, and if so, how much is it out of line in abnormality?

A. I would say that a good weight for her height and skeletal structure would be about 180 pounds, and she could carry that very easily and wouldn't put any extra strain on her heart and blood vessels, and her blood pressure probably [276] would drop down to, oh, I would say around 160 over 90 or 80, which is normal.

Q. Would it be possible under proper medical care to effect the weight reduction and the reduction in blood pressure?

A. It would be a gradual process. I don't think it's due to her glandular system at all. I think it's just a matter of restricting the weight-producing

(Testimony of Willis E. Smick.)

foods, and it would take about a year of constant medical supervision.

Q. Now, Doctor, did you cause an examination to be made of the left foot?

A. I examined the left foot the other day, the day before yesterday; had it X-rayed. I didn't make any extensive physical examination because I wanted to compare the bony X-ray—from the X-ray evidence the bony change, if any, in the right foot and ankle as compared to the left foot and ankle, because we know that if a part isn't being used it shows on X-ray, and if a generalized arthritis is evidenced throughout the body, it will show in the uninjured foot. If the arthritis is due to an injury it will show only in the injured area. There was no difference in the calcium decalcification process, or any pathological process in the left or right foot, which shows that both parts are being used, and if a part isn't able to function and isn't able to be used it will gradually get smaller, and the X-ray will show on examination that the calcium is [277] being not deposited as it is in the bony structure that is being used, and the X-ray examination the other day didn't show any active arthritic process or aggravation in either foot. In fact, it showed some improvement over the X-ray taken on September 11, 1950. There was a minimum amount of arthritic change in the lower part of the ankle at that time.

Q. Did you find arthritis in your examination of September 11, 1950?

A. A very small amount.

(Testimony of Willis E. Smick.)

Q. Did you find more, or less, in your examination of last Tuesday or Wednesday?

A. Well, according to this X-ray roentgenologist, his interpretation and mine also, we find——

Mr. Wolff: Just a moment; I object to what someone else may have said or interpreted.

The Court: Yes, I think the testimony should be limited to the doctor's own opinion.

A. Well, it's my opinion after examining the X-rays also the day before yesterday that there was very little evidence if any of any arthritic activity in the right lower extremity.

Q. What was her condition on September 11, 1950, with regard to the injured ankle, her use of that?

A. What was the question? [278]

Q. What was her condition, what was the condition of the injured ankle and what did your examination show about her use of the injured ankle?

A. There was a definite, demonstrable physical impairment there. The joint freedom of motion was restricted a small percentage in every direction, eversion, which is out and upward motion of the ankle—of the foot, and inversion motion was slightly restricted. However, it was very minimal, and there was some residual enlargement of, I say, $\frac{1}{4}$ of an inch estimated circumference around this fractured area of the internal external malleoli, but as far as demonstrating the pain she complained of, I couldn't find as much evidence of this pain, as much as she was complaining of. I couldn't demonstrate on examination just enough organic

(Testimony of Willis E. Smick.)

pathology to cause that much pain. However, that is a subjective condition, and it is at times difficult to try and find all the organic basis for nerve pain.

Q. Now, in your examination on April 11, 1951, what did you find with regard to movement of this injured ankle at that time?

A. I didn't examine it further at that time. I observed her walking around the room, and took her weight, but I didn't make any extensive examination of the range of motion of the ankle. [279]

(Whereupon, four X-rays were marked Defendant's Exhibits Nos. 28, 29, 30 and 31 for identification.)

Q. (By Mr. Erickson): I'll hand you these, Doctor, and ask you what those are.

A. Number 28, that's an X-ray of Mrs. Thera Phillips' right—it's on the right foot and ankle, taken on 4/11/51, and it shows the right foot and ankle.

Q. I hand you——

A. Just a minute, I want to say a little more about this. This shows the old fracture of the internal malleolus in good position, and the tips of those fractured bones, the head of the fibula and the internal malleolus of the tibia are well healed; in fact, it's difficult at this time to even see that the bone had been broken. There is very little, if any, arthritic change in any of the joint articulations.

(Testimony of Willis E. Smick.)

Q. I'll hand you 29 and ask you to state what that is.

A. That's the left foot and ankle——

Mr. Wolff: Just a moment, please; I think it's in order for the record that we object to reference to these exhibits without them being identified; they haven't been identified.

Mr. Erickson: That's what I'm trying to have done.

The Court: Just a moment; I think they should be [280] identified and offered first, and then have the doctor comment on them. He can tell what they are.

Q. (By Mr. Erickson): Just state what 29 is, Doctor.

A. X-ray Exhibit 29 is the left foot and ankle of the plaintiff.

The Court: Were these X-rays taken under your direction, Doctor, or in your office? How were they taken?

A. I sent them to a roentgenologist upstairs.

The Court: I see; they were taken at your direction?

A. My direction.

Q. (By Mr. Erickson): I hand you 30, and ask you what that is?

A. This is the right concentrating X-ray of the right ankle region.

Q. Taken at the same time and place and under your direction? A. Yes.

(Testimony of Willis E. Smick.)

Q. I hand you 31, and ask you to state what that is?

A. This is the left foot and ankle, Exhibit 31, taken under my direction, of the plaintiff.

Q. April 11, 1951? A. Yes.

Mr. Erickson: I'll offer 28, 29, 30 and 31.

Mr. Wolff: I don't care to look at them. For the record, I don't want to delay matters, but I do think they have not been properly identified, and I object to them on [281] that ground. They weren't taken in his office; he wasn't present, he's testifying these are pictures of her leg, and I don't think they are admissible under the rules.

The Court: I doubt if they have been properly identified, that he knows what they purport to be.

Q. (By Mr. Erickson): Do you know that these are taken of the right and left leg, lower leg, of Thera Phillips? A. Yes.

The Court: How do you know that, Doctor?

A. Well, we get a written signed report of every X-ray patient that's sent upstairs to a fellow who is a specialist in X-ray work, and in fact he brought them downstairs and showed them to my nurse, I happened to be out at the time. On this particular instance we wanted to look at them wet.

Mr. Wolff: I don't think that identifies the X-rays, your Honor. It's based on hearsay.

Mr. Erickson: I'll ask you to mark this letter for identification.

(Testimony of Willis E. Smick.)

(Whereupon, report on X-ray examination dated 4-11-51 was marked Defendant's Exhibit No. 32 for identification.)

Q. (By Mr. Erickson): I hand you identification 32, and ask you what that is?

A. This is a written report of X-ray examination of Thera [282] Phillips taken on 4/11/51 at the request of Dr. W. E. Smick, and there is an examination report, and at the bottom it's signed by the roentgenologist, Augustus F. Galloway.

Q. Do you recognize the signature?

A. Yes, it's the same as the one taken on 9/11/50. The signature is the same.

Q. And I'll ask you whether or not identification 32, the letter, accompanied the X-rays?

A. Yes, it always accompanies the X-rays.

Mr. Erickson: I resubmit the X-rays.

The Court: Let counsel see the letter.

Mr. Wolff: Regardless of what's in the letter, I don't think it's proper to be admitted at this time. It's only hearsay. As a matter of fact, by reading the letter it's even more so; it states the opinion, and the man's name is there, and it's purely hearsay.

The Court: The objection may be a technical objection, but I don't believe that the X-ray negatives have been properly identified. That's the risk that you take when the documents and exhibits that you propose to use are not presented at the pretrial conference. That's the time to find out if

(Testimony of Willis E. Smick.)

there's going to be objection, and no disclosure of these were made at the pretrial conference. [283]

Mr. Erickson: These were taken since the pretrial.

Mr. Wolff: I have no objection to their being presented, because I think they are entitled to bring in what they found later, but I don't think they're qualified or admissible under the rules.

The Court: I'll sustain the objection.

Mr. Erickson: Then we'll call Dr. Galloway. I don't know how soon we can get him.

The Court: Well, I'll permit the doctor to testify with reference to these X-rays, with the understanding it will be connected up later by bringing the roentgenologist who has taken them.

Q. (By Mr. Erickson): Referring to these identifications 28, 29, 30 and 31, what would you say was the present condition of her right and left ankles?

Mr. Wolff: Let the record show that our objection should stand to these questions unless they are later——

The Court: Yes. Have you ever seen these X-rays?

Mr. Wolff: I don't care to see them.

The Court: Did they let you know they had taken them, or give you an opportunity to submit them to your doctor?

Mr. Wolff: They told Mrs. Phillips they wanted her to submit to an examination, and we agreed

(Testimony of Willis E. Smick.)

that she would. We have never had an opportunity to examine them. [284]

The Court: As I say, this doctor is here; I'm going to let him testify, and if the X-ray negatives are not properly identified I'll have to strike that portion of his testimony, but while he's here he may testify. There's no need of him coming down again.

Mr. Erickson: You may testify.

A. The A-P and lateral view of the left ankle shows a normal ankle and foot, and the X-ray taken of the right ankle and foot shows an old healed fracture of the internal and external malleolus, and the present position is good; very little if any arthritic change; in fact, there seems to be less in this picture than there was in the picture taken on September 11, 1950.

Q. Has there been a good union of the fracture, Doctor, or not?

A. An excellent union. The position was very good considering the type of fracture it was.

Q. Why do you say that the union has been good?

A. Well, this type of fracture with this individual being such a heavy person, it many times is hard to hold the fragments in good position, and a person has to look several times at this X-ray to see any evidence of an old fracture.

The Court: I might say for the record, that while the Court looked at one of these X-ray negatives that [285] hasn't been admitted in evidence,

(Testimony of Willis E. Smick.)

there's been no prejudice, because I couldn't make head nor tail of it; I might as well have been looking at the blank wall. Go ahead, Doctor.

Q. (By Mr. Erickson): Would you say as the result of your two examinations that Mrs. Thera Phillips, the plaintiff in this case, suffers any permanent partial disability, or not?

A. From the X-ray evidence, you say?

Q. From all the evidence of your examinations, both X-ray and otherwise.

A. I would say that there is a minimal, because of the history of the fracture in this area, which is rather serious, I'd say she has a permanent partial disability of 5 per cent, approximately. This figure is based on total disability evaluation of \$10,000. Five per cent of that.

Mr. Wolff: I object to the latter, as to the amount.

The Court: Yes, I think that's improper, and should be stricken.

Mr. Erickson: That's all; you may examine.

The Court: The 5 per cent may stand, but as to the evaluation of what that would amount to, that will be disregarded. Did you say 5 to 8 per cent, Doctor? [286]

A. No, just 5 per cent.

Mr. Kelley: Will your Honor pardon me? I didn't catch what he was talking about; the \$10,000 I know your Honor has said that will be stricken, but I would like to know what he said.

(Testimony of Willis E. Smick.)

The Court: He started to compute what 5 per cent of \$10,000 would be.

Mr. Kelley: Oh, I see, that figure is based on the total disability?

The Court: Yes. All right, go ahead and cross-examine.

Cross-Examination

By Mr. Wolff:

Q. Doctor Smick, you know what Mrs. Phillips weighs, do you?

A. Approximately between 236 and 240 pounds.

Q. And you know that's been her weight for a long time?

A. I would say according to my history which I took it has been for some time that way.

Q. Many years? A. Years, yes.

Q. Do you know, Doctor, that she suffered a dislocation of this ankle? A. When?

Q. On the 28th of January, 1949.

A. Well, with any fracture there probably is a little bit of dislocation, I don't care what kind it is; a fracture near [287] a joint, I mean.

Q. Pardon?

A. In a fracture near a joint, if there is a separation of the fragments at all, why, there is going to be a little bit of joint dislocation.

Q. And so Mrs. Phillips suffered dislocation in this right ankle? Please state your answer audibly.

A. Technically, yes.

Q. She did? A. Yes.

(Testimony of Willis E. Smick.)

Q. Doctor, what is meant when you said that an ankle is palpated?

A. Felt; feel it with your hands.

Q. That it's felt? Oh, when you put your hands on it you can feel what?

A. You feel for fragment crepitation, that is motion, or whether it's warm, cold, and all that.

Q. I see. Now, this fracture and dislocation, did that occur in a weight-bearing joint, Doctor?

A. What's that?

Q. Did this fracture and dislocation occur in a weight-bearing joint?

A. Yes, a weight-bearing joint.

Q. And you did find, Doctor, in September that there was some arthritic change, is that not correct. [288]

A. Suprisingly enough, the arthritic change wasn't very evident in the fracture area; it was in the articulation of the astragalus with the navicular bone, which is a part of the foot, not the ankle.

Q. Just what do mean in layman's language as to that, Doctor?

A. Well, the arthritic changes weren't evident in the fracture site.

Q. You don't mean to say that this arthritic condition had no relation to the break and the dislocation, do you?

A. Being as it is in that region I would say it could possibly be related, but as far as 100 per cent evidence that it was related to that fracture, I can't say that.

(Testimony of Willis E. Smick.)

Q. And you wouldn't say that it was unrelated?

A. I can't say that it is unrelated, either.

Q. As a matter of fact there is nothing to indicate that it is anything but related, is there, in this case? Did you find from your examination that there was something else that would cause that arthritic condition?

A. Well, no.

Q. Now, wouldn't you say, Doctor, in view of your experience and training, that a person of this weight of approximately 240 pounds, suffering the injury Mrs. Phillips did to a weight-bearing joint, would be expected to have considerable pain and suffering in that joint? [289]

A. She could have pain in that joint, yes, weighing that much.

Q. Pardon me?

A. With that kind of weight, yes. She needs extra strong joints and bones to hold up.

Q. That's right. When you took her blood pressure yesterday, Doctor, did you take into account the fact that she had walked the steps from the courtroom, the ten or twelve or fourteen steps that are just outside the courtroom door, several times that day?

A. I let her rest a couple of minutes; I took it first and then let her rest. I repeated it approximately two or three times.

Q. The fact that she did walk those steps had some bearing upon what you found, however?

A. The blood pressure was the same, practically the same as it was in September, 1950.

(Testimony of Willis E. Smick.)

Q. So that appears to be Mrs. Phillips' general condition?

A. Yes. She isn't very healthy physiologically.

Q. She is, you say? A. No.

Q. She is not. The fact there is a good union of the bone does not entirely do away with the question of pain and suffering and disability, does it, Doctor?

A. Those are very important in respect to avoiding pain in a fractured area. [290]

Mr. Wolff: I don't think that answers my question; maybe you didn't understand it. Would you read it, Mr. Reporter?

(Pending question read by the reporter.)

A. That's true.

Q. You know, Doctor, that in connection with this accident she suffered an extensive tear of the joint capsule, ligaments, vessels, and soft tissues of the region, is that not true?

A. That happens in almost any fracture, serious fracture.

Q. Now, the tissues heal by scar tissue, isn't that correct?

A. Or if it's bone tissue it heals by replacement. If it's soft tissue, ligaments and tendons, they regenerate by scar tissue.

Q. And isn't it likely, in view of these facts just set forth, that there would be considerable disability from the soft tissue apart from the bone injury? A. That I don't know.

(Testimony of Willis E. Smick.)

Q. Do you mean that your experience hasn't led you into a question of that type?

A. Not in every case; there isn't that much damage.

Q. But that's one of the probabilities in an injury of this type, is it not?

A. The probability exists, yes, in this type of injury.

Q. And also, Doctor, under the facts relating to Mrs. Phillips' [291] injury, with a dislocation and all of the other factors we've mentioned, is there not more of a possibility of recurrence than if it had been a pure and simple fracture?

A. Recurrence? I don't get what you mean.

Q. Recurrence of the break or the dislocation.

A. In regards to the break re-occurring, we have found that when nature gets through repairing a bone it's even stronger in the area after it's completely healed than it is in the other part of the shaft.

Q. As to the dislocation, however, there is a greater danger of recurrence, is that not correct?

A. That type of structure, the ligaments and tendons does not repair as well as the bone.

Q. And in answer to my specific question, then, your answer is yes? A. Yes.

Q. Did you have occasion to measure the atrophy in her calf, Doctor?

A. No, I didn't measure the calf; I measured the fracture area circumference.

Q. You've indicated what you found on that.

(Testimony of Willis E. Smick.)

Yesterday the word "malingerer" came up here in court, Doctor. Would you say that Mrs. Phillips is malingering?

A. I don't think she's a malingerer deliberately, no.

Mr. Wolff: That's all. [292]

Redirect Examination

By Mr. Erickson:

Q. I think I forgot to ask you, did Mrs. Phillips give you any history of any previous medical treatment that she had taken for this fracture, when you first saw her on September 11, 1950?

A. Oh, yes; she had good treatment down at the site of the accident down there, Dr. Eugene Wiley.

Mr. Wolff: Just a moment; I think what she had might be hearsay.

The Court: Is that what she told you, Doctor?

A. Yes, I have it here in the history.

The Court: Overrule the objection.

A. In the history of her injuries she had a very good medical and surgical care for this fracture, and then she also came to Spokane and had an orthopedic specialist examine and treat this foot in one of the local hospitals here.

Q. Who was that orthopedic specialist?

Mr. Wolff: Just a moment; if that's what Mrs. Phillips told him.

Q. Yes, that's what I'm asking, what Mrs. Phillips told him about it.

A. Dr. A. O. Adams.

Q. And did she tell you how many treatments

(Testimony of Willis E. Smick.)

she had got from Dr. Adams? [293]

A. Yes, she spent a few days in the hospital, and he gave her this manipulation of the foot under anesthesia.

Q. Well, what anesthesia, did she tell you?

A. Penathol, intravenous anesthesia.

Q. Was it sodium penathol?

A. Sodium Penathol.

Q. And what would be the purpose of that, Doctor?

Mr. Wolff: Oh, I—go ahead, no objection.

A. Well, I must say here that also after she gave me this history I went and got the information off of the hospital chart, and in general, sodium penathol anesthhesia is given for short duration surgical or manipulative procedures, and of course it's been used for other purposes. It's known as a—if the mind deliberately is trying to hide anything, the part functions normally, if it's being restricted by the patient's conscience, and in her unconscious state under this anesthesia the part will function and give normal range of motion, as the brain restriction is removed under the anesthesia.

Q. Now, directing your attention to a woman of Mrs. Phillips' age and physical condition, would it be possible for her to climb stairs and to participate in dancing and social functions, assuming that she had no break in the leg, without endangering her health?

Mr. Wolff: Just a moment; I think this should

(Testimony of Willis E. Smick.)

be [294] a part of the direct examination; we're in the redirect, and I don't think it's a proper part of the examination.

The Court: Overruled.

A. Well, with her build and her blood pressure and her strength and everything, as she gets older, any younger person can stand quite a bit of extra body weight, the heart can stand it, but as you go past 40, then is the time to correct any overburdening physical factors such as excessive weight. That's the time to remove it if you're going to avoid a constantly increasing blood pressure, and her blood pressure has reached about as high as anyone who can get around without cardio-vascular impairment.

Mr. Erickson: That's all.

Mr. Wolff: That's all, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: I've just been thinking about this X-ray business; frankly, I haven't had occasion to go into it, because usually counsel are not quite that technical.

Mr. Wolff: Well, let me say, your Honor——

The Court: These X-rays, it seems to me a line should be drawn some place; a modern doctor may send out and get X-rays one place, a Wasserman another place, do we have to bring all those technicians in here?

Mr. Wolff: No. Let me say I withdraw the

objection, [295] because I don't want to delay this.

The Court: If you want to raise any question about them, that's fine.

Mr. Wolff: No, I withdraw it rather than that.

The Court: The X-ray photographs, defendant's 28 to 31, will be admitted.

(Whereupon, Defendant's Exhibits No. 28, 29, 30 and 31 for identification were admitted in evidence.)

The Court: All right, proceed gentlemen.

CHESTER E. BENJAMIN

recalled as a witness on behalf of the defendant, resumed the stand and testified as follows:

Direct Examination

By Mr. Kelley:

Q. You're the same Chester Benjamin sworn the other day, and who testified in this cause?

A. Yes.

Q. And you are with the Bureau of Reclamation?

A. Yes, sir.

Q. And I've forgotten for the moment, what is your position? A. City Engineer.

Q. And you have graduated from what engineering and architectural firm?

A. I'm a graduate of Trinia, Heath and Gose in Tacoma, which is a private office, training organization at that time. It's been 40 years ago. [296]

Q. How long have you been in the construction business? A. All my active business life.

Q. Some 40 years?

(Testimony of Chester E. Benjamin.)

A. 40 years; started about 40 years ago when I was a sophomore in high school.

Mr. Wolff: We'll admit his qualifications as an experienced engineer; not a graduate, but an experienced engineer.

Q. Thank you. Directing your attention to this proposition of electrical devices, without preliminary question, does, as a general proposition where these electrical devices are used at all on buildings, does ice have to be in close contact with the wire?

A. You're referring now to these heating cables?

Q. Yes.

A. The temperature of the cable is quite low, and requires the ice to be in quite close contact.

Mr. Wolff: I might say if it will shorten matters that we'd even agree that Mr. Benjamin will testify that the electrical gadget we mentioned wouldn't cure the problem at Coulee Dam, if that's what he's about to testify to.

The Court: I think they probably want the details of his testimony.

Mr. Wolff: Not that we agree that's true, but that [297] he would so testify.

Q. (By Mr. Kelley): By the way, directing your attention to the Plaintiff's Exhibit Number 13, can you tell without going into the feet and inches what the degree of the pitch of the roof of that General Store portrayed there is?

A. I believe the whole pitch is between a third and a quarter pitch.

(Testimony of Chester E. Benjamin.)

Q. And what do you mean by a third and a quarter of pitch, for the record?

A. The rise of the roof ridge to the total width of the building.

The Court: I didn't get that last.

A. The proportion of the rise of the roof to the total width of the building.

Q. In other words, this roof rises one-third the width of the building, is that it?

A. It rises at that rate.

The Court: There's a difference in pitch, as I remember looking at it.

A. That's right. This rise, that would be the pitch.

The Court: You're talking about the lower part?

A. Yes, sir.

Q. (By Mr. Kelley): And what significance does this one-third rise of the pitch have, as an engineering proposition?

A. It tends to accumulate the precipitation at the edges a [298] little more rapid than it would if it were flatter. It would influence the freezing rate at the edge by the velocity of the water down the roof.

Q. What influence, if any, would it have in the determination as to the feasibility of putting in an electrical device, a cable and so forth, that's been testified to?

A. It's steep enough to pitch ice across the cables and bridge them, and the cable would not be able to melt the sliding mass of ice as fast as it

(Testimony of Chester E. Benjamin.)

came down. It would therefore cross the cable and probably be at a later time cut off by the melting.

Q. What would be the effect of that?

A. If the ice were not entirely lodged in the gutters it might fall in masses.

Q. If I follow you correctly, the ice could bridge over any wire and melt, causing the ice to fall in chunks and produce even a greater hazard?

A. Not in every wire, but in this case it would do so.

Q. By this case, you mean this General Store Building? A. This building, yes, sir.

Q. On the theory that one picture or sketch, as the Chinese say, is worth a million words, do you suppose you could just indicate a profile on a piece of paper, as to what you mean by that?

A. You want a profile of the section of the roof at that point? [299]

Q. Yes.

(Whereupon, the sketch was marked Defendant's Exhibit No. 33 for identification.)

Q. Directing your attention to that picture, exhibit 13, does it indicate a downspout?

A. There. It indicates one of the downspouts. There are a number of them.

Q. And by the way, state whether or not the downspouts on that General Store Building, are they exposed to the air?

A. Yes, as far as the sidewalk.

Q. And then what happens to them?

(Testimony of Chester E. Benjamin.)

A. Then they turn under the sidewalk to the curb.

Q. Are there any storm sewers in Coulee Dam?

A. Not at that time there weren't. There are some new ones being built now; not at that location, however.

Q. I believe you testified in response to counsel's question that you're also the building inspector down there?

A. Yes.

Q. At least you're familiar with the buildings——

A. Yes.

Q. ——in your line of duties. Do you know that in this winter of 1949 there were other buildings at Coulee Dam that had this same problem of ice and snow on the roof and the eaves?

A. I think there were a number of [300] buildings.

Q. Well, now, I wonder just for the record, without going into detail, if you can enumerate some of them?

A. I had trouble at the Recreation Hall, the Columbia Motors Building, the Administration Building, the warehouse, United States Post Office Building, and there were a number of others, but those are the principal ones.

Q. Any schools?

A. I didn't have too much trouble in that regard with the schools.

Q. Hotels?

A. The hotel, I had some trouble.

Q. Theatre?

(Testimony of Chester E. Benjamin.)

A. The theatre, I had some trouble.

Q. And in this weather of the winter of 1949, what tendency did the weather give to this ice problem on the roofs and eaves?

A. You mean did it aggravate it?

Q. Well, yes.

A. It did aggravate it.

Q. Let's get right down to this General Store Building. Handing you Defendant's Exhibit 32 for identification——

The Clerk: That's identification 33.

Mr. Kelley: It has 32 on it.

The Clerk: It should be 33.

Mr. Erickson: I'll ask that 32 be [301] withdrawn.

Q. (By Mr. Kelley): Is that a rough profile of the waterspout there? A. Yes.

Q. And what significance, if any, does the type of construction that is outlined there bear to the feasibility of putting any electrical device in?

A. The amount of ice accumulating on the roofs at such periods is so great that the electrical devices mentioned are not suitable for a building of this size. They are suitable for small installations, and I have some experience with those.

Q. By the way, did you ever try them in any other building there, the Administration Building?

A. Yes, the Administration Building has a set.

Q. How does it work even there?

A. It doesn't work too well. That's just beyond

(Testimony of Chester E. Benjamin.)

the limit of the capacity of the machines to thaw the ice.

Q. Yes.

Mr. Kelley: I just offer this for illustrative purposes in connection with this witness' testimony, if your Honor pleases.

Mr. Wolff: No objection.

The Court: It will be admitted, to illustrate the testimony of the witness.

(Whereupon, Defendant's Exhibit No. 33 for identification was [302] admitted in evidence.)

Q. (By Mr. Kelley): And by the way, going right to this General Store Building, had you had trouble with the ice on the roof before?

A. Yes.

Q. And had you attempted to take out or take off the ice on the roof before Mrs. Phillips' fall?

A. Yes.

Q. And when was this? A year or so before?

A. A year or so before, about a year before.

Q. And just outline briefly to the Court your efforts, what it took to get the——

A. I moved a portable steam boiler, a truck mounted boiler of 25 horsepower capacity, over to the store, and by means of boom trucks and steam hoses I placed riggers and other mechanics up on the roof and along the eaves of the roof, on the boom truck, and thawed the ice off the roof completely.

Q. On what side?

A. Along the north edge of the building.

(Testimony of Chester E. Benjamin.)

Q. Just along the north edge alone?

A. I had a crew of sometimes eight men, always six men, on that crew for about two shifts, two day shifts, to take that ice off. There was about three tons of ice on the eaves. [303]

Q. And that was in 1948?

A. I believe it was the winter of 1948-1949, but I can't remember whether it was before the New Year or afterwards.

Q. Now, this downspout that you've illustrated in exhibit 33, is that exposed to the air?

A. Yes.

Q. Is that the situation with some of the other downspouts? A. Yes, they're all exposed.

Q. I see, and as you've indicated, they go under the gutter there?

A. I'm not certain that they all go under, but I know that some of them do.

Q. Well, if you were to put, or attempt to put live electric resistance wires as has been suggested here in that downspout, what would be your problem?

A. Well, I would have a number of hazards that don't exist with the ice. In addition to the ice hazard, falling ice in larger masses, I would have some risk from damage to the cables and injury to my men from either burning or short-circuit shock.

Q. How about the passerby?

A. The passerby could possibly be injured by the cables in the downspouts; they would have to be thawed as well.

(Testimony of Chester E. Benjamin.)

Q. How about the kids coming from school?

A. Well, any place the cable would be exposed would be a [304] hazard.

(Short recess.)

Q. Mr. Benjamin, can you briefly indicate to the Court what significance, if any, is the fact that there were no storm sewers in Coulee, and you may use, if it will help you, for illustration that exhibit 33, that profile; of what significance is that fact, as to the flow of water?

A. Well, the significance of the fact there are no storm sewers is that the drainage is therefore surface drainage, and any water must either remain water or it will freeze up and pile up in gutters and drains and so forth, blocking any further drainage.

Q. Then particularly with reference to any possible electrical device, if the ice were to be melted by the heat what would happen to it?

A. Well, if enough heat were supplied to melt the ice and keep the downspouts open, it would plug in the drains and curbs and just back up to the gutters and run over as it was before, as water.

Q. You'd still have the problem of the water coming down the downspout to the sidewalks?

A. That's right.

Q. By the way, in cities or places where they do have storm sewers, where are they usually buried with respect to the frost line? [305]

A. We try to keep all sewers, storm and sani-

(Testimony of Chester E. Benjamin.)

tary, below frost line. That's the general practice in this climate, in this latitude.

Q. By the way, how long have you been at Coulee Dam?

A. I went to work at Coulee the 10th of March, 1935; that's 16 years.

Q. Well, at least from the year 1937 state whether or not it's a fact that the winter of 1948-1949 was the most—or the winter of 1949 was the most severe since you've been there with reference to the ice and snow conditions at Coulee?

A. I believe that the winter of 1949 and 1950 was the worst winter, and 1948-1949 would run it a close second.

Q. I see.

A. That is with reference to ice and protracted cold.

Mr. Kelley: You may inquire.

Cross-Examination

By Mr. Wolff:

Q. Mr. Benjamin, what do you mean when you say it was the worst winter? What do you mean by that?

A. Well, from my standpoint, we had more protracted freezing, longer and more continued cold weather, and with above normal amounts of snow-fall.

Q. Have you examined the weather bureau records as to weather at that particular time?

A. Have I? [306]

(Testimony of Chester E. Benjamin.)

Q. Yes.

A. No, I haven't since this trial began.

Q. Don't you realize, Mr. Benjamin, that the fact is that there was only 9 9/10 inches of snow in January, 1949, according to the weather report?

A. That's about twice our normal.

Q. Do you know how much snow there was in December of 1942?

A. Yes, there was a pretty heavy snowfall, but it was not cold.

Q. It wasn't cold?

The Court: I didn't get that last date.

Q. December, 1942. Do you know what the mean temperature was in January, 1949?

A. In January, 1949? The mean temperature would be somewhere in the neighborhood of 17. That's a guess.

Q. All right. Do you know what the mean temperature was in January, 1943? Well, it was 18.6, according to the weather bureau records. Doesn't that sound right to you?

A. Probably. January is our worst month.

Q. So the mean temperature wasn't far off of what it had been of several other years?

Mr. Kelley: What years, please?

Mr. Wolff: I submit he can answer that question.

The Court: If he doesn't know he can say so.

A. I don't think so. [307]

Q. You don't think it was far off from what it was in other years, is that right?

(Testimony of Chester E. Benjamin.)

A. I believe that the mean temperature of 1948-1949 and 1949-1950, coupled with precipitation and duration, was worse than any previous years since I've been at Coulee Dam.

Q. Do you know, Mr. Benjamin, that there had been nothing but a trace of precipitation during the nine days before Mrs. Phillips fell, at least? Nothing but a trace, isn't that right?

A. That's correct. That trace is measured in water content, not in inches.

Q. And there was practically no water content during at least nine days or more prior to the time she fell; that is correct, isn't it?

A. That's probably correct.

Q. Yes, and do you know that there were many winters when there was more than twice as much snow as there was in January, 1949, isn't that right?

A. I wouldn't say many; there may have been a couple.

Q. How long have you been there, did you say?

A. I've been there since the work started on the dam, almost; I'm on my seventeenth year.

Q. All right, let's start with 1937. There was 14.4 inches of snow in that year, if you remember, isn't that correct? [308]

The Court: What time, Mr. Wolff?

Q. January of 1937.

A. That was a pretty cold year.

Q. Yes, that fell that month; that was a pretty cold month, wasn't it?

A. Yes.

Q. And February of 1937, do you know it's a

(Testimony of Chester E. Benjamin.)

fact that there was 15.5 inches of snow that fell that month, is that right?

A. That was a bad month.

Q. Do you know that in January, 1943, there was about 7 inches of snow that fell that month?

A. That's six years later, yes.

Q. 1942, take. Do you know that there was nearly 9 inches of snow that fell in December, 1942?

A. Yes, that's about the time we get it.

Q. That's right, so in December, 1942, you had about 9 inches of snow falling; in January of 1943 you had about 7 inches, isn't that right?

A. I don't know.

Q. Well, you don't know what the snowfall was, do you?

A. No. I've been there 17 years. I couldn't check the year against the month and the snowfall. That would be too much to expect of my weak memory.

Q. So you're not too accurate on what the conditions were at that time of the year in comparison with other years? You [309] could be off in your memory, isn't that right?

A. Not too much. I'll tell you why.

Q. Yes.

A. It's part of my business to watch this freezing and snowfall, because I have to take charge of plowing, and my diary indicates when the plowing commenced in most of the years and when the weather got bad and when the temperature dropped, and how long it stayed down. In referring back to

(Testimony of Chester E. Benjamin.)

these points I have a pretty good memory, I would say better than the average, but of course it couldn't equal the record.

Q. All right. Now, Mr. Benjamin, just what is the condition there as to weather that creates the problem you say you have about this water on the sidewalk? What is there about the weather that creates that problem?

Mr. Kelley: During the year 1949-1950, the winter of it?

Mr. Wolff: At any time.

Mr. Kelley: I think he should be restricted.

The Court: Well, he's asking for a general statement as to what creates the problem.

A. The problem, strangely enough, is not created by snowfall nor extremely low temperatures. The problem is created by an atmospheric temperature approximately at the freezing point during the noon hour or the two or three hours each [310] side of noon. If the atmospheric temperature is approximately 32, then the escape of heat from the buildings will melt the water and it will run to the edge. If the temperature then drops to 30 or 28, when it reaches the edge of the building it freezes on the roof and collects there, so it isn't either the amount of snow that falls nor is it the low temperature that causes this particular problem at Coulee Dam.

Q. Well, you knew about that before January 28, 1949?

A. Oh, I've been aware of that for years.

Q. Let's see, you put down flakes on the sidewalk there in the community, don't you?

(Testimony of Chester E. Benjamin.)

A. We don't use very many dow flakes. We don't use any where the sidewalks are through the lawns, but at such a point as the general store we did use them.

Q. What do you use them for?

A. Dow flakes has the faculty of dropping the temperature about 10 degrees freezing point, which means that the ice would then thaw at 32—or might thaw at 22 when it would not thaw at 32 before the dow flakes were put on.

Q. Well, generally you use them to make a sidewalk safe for pedestrians, isn't that right?

A. To melt the ice; correct. We use other things, too.

Q. Was the atmospheric condition there near the General Store Building on the 28th of January, during these few hours of [311] noon time, it was about the same on that date as it had been on several days before, wasn't it?

A. I don't recall any difference; it was probably the same.

Q. And as a matter of fact that situation was the same at that noon time on any year when you had weather conditions where there was a good deal of snow and when there was cold weather, isn't that right?

A. I'm not sure that I understand what time.

Q. Well, let's put it this way; strike the question: During the few hours of noon that you mentioned when you have this atmospheric condition

(Testimony of Chester E. Benjamin.)

that you expected, you had seen that in prior years, had you not? A. Yes.

Q. Isn't it also true, Mr. Benjamin, that you people plowed out the street along Roosevelt Avenue? A. The road plows?

Q. Yes. A. Yes, we do.

Q. And they permit the snow to be piled up on the edge. You had some photographs here. Let's see, I guess these little ones show it better.

Mr. Kelley: For the record, my recollection, if your Honor pleases, they were admitted on pre-trial for illustrative purposes, to show the building and so on. If there's some point to be made as to the condition, we ought [312] to know the time and the day of the month and the year that they were taken, and so on.

Mr. Wolff: Well, I understood that they were admitted, and I understood they were admissible for all purposes.

The Court: Well, as I understand it, they're not intended to show the condition at any particular time, so if there is snow shown in them, it would be simply for illustrative purposes. As I understand, it's not intended to be related to the time of the accident at all.

Mr. Kelley: That was my understanding of the pretrial arrangement. Of course, if he seeks otherwise——

Q. (By Mr. Wolff): Now, isn't it a fact, Mr. Benjamin, referring to your defendant's exhibit 33,

(Testimony of Chester E. Benjamin.)

that snow becomes piled along the edge of the sidewalk near the curb?

A. Yes, the plows push the snow to the side.

Q. And it piles up, doesn't it, at that point?

A. Not the way you've indicated, it doesn't.

Q. Will you indicate how it piles up?

A. Now, that's relative to the scale.

Q. Yes. How high—how far is it from the sidewalk to the roof of the building, Mr. Benjamin?

A. It's a variable distance, as you can see in the picture.

Q. Well, let's say at the point where this gutter happens to be that you've drawn in on your exhibit 33. [313]

A. Oh, I would say that's about 20 feet.

Q. Then you'd say that the pile of snow that you've just indicated there, approximately—well, I suppose that would vary between years, wouldn't it, how much snow was there, as to how high that pile would be?

A. That's correct.

Q. And if there was a lot of snow the pile would be high, and if there wasn't much snow the pile wouldn't be high?

A. That's right.

Mr. Wolff: That's all.

Mr. Kelley: That's all.

(Whereupon, there being no further questions, the witness was excused.)

BESSIE DUMAS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Bessie Dumas.

Q. And where do you live now, Mrs. Dumas?

A. Wenatchee.

Q. And on or about January 28, 1949, what place of business were you operating at Grand Coulee at that time?

A. The Dumas Beauty Salon.

Q. And that is located in the mezzanine of this General Store Building at Grand Coulee? [314]

A. Yes.

Q. And how long had you been operating a beauty salon at that point?

A. I started on August 1, 1947.

Q. Since 1947? A. That's right.

Q. Do you know the plaintiff in this case, Thera Phillips? A. Yes.

Q. And had she been a customer in your beauty salon for some time before that? A. Yes.

Q. Do you remember treating her or fixing her hair or giving her some other treatment on the day that she was injured?

A. One of the girls took care of her that morning.

Q. Did you talk to her when she was in the beauty salon? A. Yes.

(Testimony of Bessie Dumas.)

Q. And that was the same day that she slipped and fell on the ice? A. Yes.

Q. And what conversation did you have with Mrs. Phillips at that time, Mrs. Dumas?

A. Well, just word for word, I couldn't repeat it.

Q. Well, what was the substance of it? What was said about the ice?

A. We did speak about it being slick, about the ice, the icy [315] condition of the street.

Q. That was immediately before she was injured? A. Yes.

Q. And what did you say to her about being careful, and what did she say to you?

A. I said that I was very careful each morning, I was afraid I wouldn't reach the shop without falling, and I did say "You be careful and don't fall."

Q. Did you say anything about her being especially careful or particularly careful?

A. Well, I think I said "Be careful and don't fall." That's all I can remember about that conversation.

Q. Was anything said about her weight, or a woman of her weight being careful about falling?

A. I don't remember that.

Mr. Erickson: That's all.

The Court: You don't tell your customers that they're too heavy, do you? A. No, I don't.

(Testimony of Bessie Dumas.)

Cross-Examination

By Mr. Wolff:

Q. Mrs. Dumas, did you have any other customers that morning?

A. Well, I don't remember whether I did at the time she was there.

Q. During the morning?

A. Oh, yes, I must have. [316]

Q. She wasn't the only person that crossed the ice to come into your place of business, then?

A. No.

Mr. Wolff: That's all.

The Court: Any other questions?

Mr. Erickson: No, that's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Erickson: I believe the record shows that these weather reports were offered by the plaintiff in this case?

The Clerk: No, it doesn't.

Mr. Erickson: Then we'll offer them at this time.

The Court: Have they already been marked?

The Clerk: Yes, in the pretrial they were marked as defendant's identification number 14.

Mr. Wolff: Unless we've committed ourselves previously, and I don't remember it, we would object to the introduction of those in evidence unless it can be shown—not as to their authenticity

nor as to being true copies—but unless they can be identified as relating to the same conditions as the General Store Building. Some weather reports are made some place, and some are made another, and unless they are tied in to the conditions at the General Store Building I don't think they're admissible. [317]

Mr. Kelley: Well, it's a matter of probative value.

The Court: They simply were identified at the pretrial conference, as I remember it.

Mr. Wolff: The pretrial order states, your Honor——

The Court: Yes, that their authenticity is not questioned.

Mr. Wolff: But reserving all other objections to the admissibility.

Mr. Kelley: I haven't heard any grounds urged to the Court with respect to the competency, relevancy or materiality. I assume the probative value would be a matter to be considered in argument.

Mr. Wolff: Well, I say, your Honor, certainly a weather report from Spokane would not have any probative value, and unless these are shown to be under the same conditions as at the General Store Building they wouldn't have probative value.

The Court: I was trying to see from the reports themselves; we must assume they are authentic and that they are what they purport to be. Do they show what the station was here?

Mr. Erickson: Yes, Coulee Dam station.

The Court: Have you any evidence or could you

agree as to where these are taken, how far from the store. Have [318] you got anybody who knows that, knows the location of the weather bureau? Don't talk to me; just talk to counsel. We don't want anything informally coming in here. My thought was if it can be shown where the weather station is, then it can be shown.

Mr. Kelley: I think it all bears on their probative value.

The Court: Well, I rather think so.

Mr. Kelley: In other words, the plaintiff's counsel didn't say "Well, you didn't have the weather bureau right near the place where she fell; it might have varied." That's always a matter of legitimate argument.

Mr. Wolff: If they were admitted on that basis it would put the burden on us to prove they were not the reports under those conditions.

Mr. Erickson: For the purpose of the record we are prepared to state that these are taken about one mile, the weather station is about one mile from the store building.

Mr. Wolff: Do you know the difference in altitude between that place and the store building?

Mr. Erickson: Yes, this is several hundred feet higher, the weather station.

Mr. Wolff: Well, then I think they're clearly not admissible.

The Court: Well, I'll admit them with that understanding, [319] that it may be argued as to whether they do show accurately the condition there at the store building.

(Whereupon, Defendant's Exhibit No. 14 for identification was admitted in evidence.)

Mr. Erickson: Please the Court, I think we're just about ready to rest, but we want to offer and have the deposition of Phil Nalder read into the record. It's already been published in chambers at the time of the pretrial.

The Court: Is that all you have, then, practically?

Mr. Erickson: Yes.

The Court: How long will that take?

Mr. Erickson: That will take perhaps 25 or 30 minutes to read that into the record; it's somewhat of a lengthy deposition.

Mr. Wolff: We'd object to the introduction of that deposition, your Honor, under the rule it must be shown that the witness is more than 100 miles from the place of trial, or one of the other grounds, and I'm sure that Mr. Nalder could be here; he's within 100 miles. We checked that because we were interested in reading Mr. Benjamin's deposition, but had to go to the expense of bringing him here.

The Court: I had some talk with the clerk after the pretrial conference. I was under the impression Coulee Dam [320] was more than 100 miles away. I don't know, of course; I don't believe it's a matter of which I can take judicial notice; whether I can theoretically, actually I don't know how far it is.

Mr. Kelley: There's another phase of the matter I think your Honor would like to hear about in the exercise of discretion. My recollection of the ar-

rangement at the pretrial was that as far as the depositions were concerned they were published. I had a phone call from counsel some time ago about these depositions, and I told him in effect I wouldn't be making any objection to them at all. I anticipated that he probably wanted to save the expense of witnesses and so forth, but in any event I talked with Mr. Erickson a few days ago and said "Well, what's the meaning of this phone call; is there some technicality about this? We shouldn't object to them, should we?" and Mr. Erickson said by no means; and I said "Well, we won't bother to bring them up here, then." Now, that's the situation we're in.

Mr. Wolff: You don't mean, Mr. Kelley, that you and I discussed whether Mr. Nalder should be brought to court?

Mr. Kelley: No, I don't mean that.

The Court: It's unfortunate, and I'm not trying to place the blame on anybody here; it's my oversight as well [321] as anybody else's; it's unfortunate that we didn't discuss it at the conference. I had just assumed that Coulee Dam was more than 100 miles away, but apparently there's some question about it.

Mr. Wolff: We were quite interested in that point, and wanted very much to use Mr. Benjamin's deposition rather than spend the witness fees to bring him, but we were convinced it was more than 100 miles and that was the only way to get him here.

The Clerk: Less than a hundred miles.

Mr. Wolff: Yes, less than a hundred miles.

The Court: Have you inquired of the Marshal's office what the mileage is?

The Clerk: I haven't inquired of the Marshal's office, your Honor, but I have a table that I compiled setting out the mileages from the different towns, through the assistance of the Triple A, and with road maps, and I think it's been recognized by Washington, at least in paying witnesses, and I've checked that, and on Mason City, as it was known at the time that I compiled it, and that's across the river where this store building is, and it shows 95 by automobile road, and the railroad of course is longer than that. By way of Coulee City it would be approximately 115 miles, according to my mileage table, but this route is from Spokane through Wilbur and taking [322] the road that branches off the highway west of Wilbur and turns north and then angles northwest to where you come over the top of the hill looking down into Grand Coulee. That's the route that shows 95.

The Court: I think the Court can take judicial notice of distances between places in the district, and I think the rule applies to the nearest usual route of travel by automobile highway, or by public highway, rather, from Spokane to the place where the witness resides. Now, there hasn't been any agreement about the matter that's definite enough to dispense with the rule or to enable me to receive the deposition, unless the rule is complied with. I don't wish to deprive either side of any evidence that they might consider relevant or helpful to the court in deciding the controversy, so that if the

deposition cannot be used, I certainly would be inclined to give the defendant time to bring the witness in here, even if we had to wait until tomorrow morning to do it. That's a matter for you to decide, of course. If we can get through with the testimony I'd hear your arguments this afternoon, but I have nothing tomorrow, and as I hadn't any particular fishing excursion in mind I have no objection to hearing your arguments tomorrow before noon. I prefer to get through by noon on Saturday if possible, but we can finish tomorrow. I'm going to recess until [323] 2 o'clock, and in the meantime you can make your plans in this matter. We can continue until 5 or even beyond that if it's necessary, to finish this afternoon.

(Noon recess.)

Friday, April 13, 1951

(All parties present as before, and the trial was resumed.)

Mr. Wolff: I might say, your Honor, during the noon hour I re-read the Nalder deposition, I hadn't for a while, and we have no objection now if they want to introduce it.

Mr. Kelley: I would have appreciated the courtesy of that statement an hour or two ago, when we could have got Mr. Nalder, but this is a sort of an off again on again Finnegan proposition. We have decided it will not be necessary to put on that deposition, if I can recall Mr. Benjamin.

The Court: All right.

CHESTER E. BENJAMIN

recalled as a witness on behalf of the defendant, resumed the stand and testified further as follows:

Direct Examination

By Mr. Kelley:

Q. I believe you have been sworn. Mr. Benjamin, in connection with exhibit 14, the weather reports, state to the Court if you know where the building known as the old concrete [324] laboratory is with reference to the General Store Building, in discussion in this case as shown in exhibit 12?

A. The old concrete laboratory was formerly located about 600 feet west of the General Store.

Q. And directing your attention to the exhibits, there were some of those weather reports taken at this old concrete laboratory?

A. Yes, they were taken there, some of them.

The Court: Do they indicate——

Q. Yes, I was going to ask him next, do they indicate on the documents which one?

A. Yes.

Q. And by what designation as to county?

A. Those in the old concrete lab are designated in Okanogan County.

Q. And those taken in the old concrete laboratory and designated in Okanogan County, do the records show there at what elevation they were taken?

A. I believe they do, but I can't——

Mr. Kelley: Pardon me a minute; I haven't

(Testimony of Chester E. Benjamin.)

talked with this witness. Will your Honor excuse me just a minute?

The Court: Yes, that's all right.

Q. (By Mr. Kelley): Directing your attention to the top of that exhibit there, and specifically to the space opposite the [325] printed word "elevation," what do the ones with respect to Okanogan County show the elevation to be?

A. These in Okanogan County are taken at elevation 1087.

Q. Now, let me ask you, were other weather reports in exhibit 14 taken elsewhere?

A. Yes, there were some of these taken in Grant County.

Q. All right. Now, where is the left switch yard?

A. The left switch yard is in Grant County.

Q. And how far is that from the General Store Building?

A. Oh, about a mile, I would say, airline.

Q. And directing your attention to the elevation on those portions of exhibit 14, that is, the ones labeled Grant County, what is the elevation?

Mr. Wolff: Just a minute, now. If the witness is testifying of his own knowledge, I have no objection; if he's merely reading what he finds——

Mr. Kelley: I'm reading this to expedite now. It's on the report itself.

The Court: Well, I'll permit the witness to point them out, because it would take me quite a while to search them out.

A. I know the elevation is 1700 feet at the

(Testimony of Chester E. Benjamin.)

switch yard, but I'm not sure that I can find it on the sheet.

Mr. Wolff: I'll stipulate that those papers show an elevation of 1700 feet at the switch yard, if that's the [326] point.

Q. Very well, we'll pass on. Now, in the third place, Mr. Benjamin, does this difference in elevation make any difference, for example, when the Bureau is dealing with government contractors?

Mr. Wolff: Just a moment——

Mr. Kelley: This is preliminary, if your Honor pleases; I'll tie it up in a moment.

A. No, it makes no difference.

Q. Do you have applications for extension from government contractors because of weather conditions and so on? A. Yes, we do.

Q. And the Bureau makes no distinction between these two points? A. No.

Q. That is, the left switch yard and the old concrete laboratory? A. No.

Mr. Kelley: You may inquire.

Cross-Examination

By Mr. Wolff:

Q. You don't contend, Mr. Benjamin, that the weather is always the same at the two points, do you?

A. It would be hard to tell any difference by looking at it.

Q. Well, you don't mean to say it is the same at the two points, do you? [327]

(Testimony of Chester E. Benjamin.)

A. No, there is a slight difference.

Mr. Wolff: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Kelley: That's the defendant's case, if your Honor please.

The Court: All right; do you have any rebuttal?

Mr. Wolff: We have no rebuttal.

The Court: Are you ready to proceed with argument?

Mr. Kelley: Just simply for the record, at this time, both plaintiff and defendant having rested, the defendant renews its motion for a non-suit and challenges the sufficiency of the evidence, on the grounds hitherto urged, to indicate no liability on the part of the defendant, and that the evidence affirmatively shows contributory negligence on the part of the plaintiff.

The Court: The motion will be denied, and the Court will consider the questions that it raises on the merits and all the evidence.

(Whereupon, counsel for the plaintiffs and the defendant presented their final arguments to the Court.)

Court's Opinion

The Court: I think as is usually the case, and more often than not the case, the difficulty is [328] not so much the applicable law as it is its applica-

tion to the facts and circumstances of the particular case.

It's my view that this act, the Tort Claims Act, under which this action is brought, by its language makes the United States liable where a private person would be, that we have or should consider this case as though the government were a private landlord and the accident had happened and the claim was presented in court against that private person, and when I say person, I think that we should make the analogy more apt, we must think of the government as a corporation rather than a private individual, because the United States can act only through agents, and the doctrine as I understand it of respondeat superior applies in these tort claims actions the same as it would in a private action, and if it's the duty of the government to do something through some of its officers, agents, or employees, and they negligently omit to do what the government is duty bound to do, there is liability under the Act, and we mustn't overlook the fact that it covers omissions as well as affirmative acts, so that if an individual who represents the government and within the scope of his duties come the doing of a certain thing, and he omits to do it, he is acting within the scope of his authority, or he is omitting to act in a matter which would be within the scope of his authority, and the [329] government is liable.

Now, looking at the case in that light, it's my view that there was here an omission which resulted in the accumulation of water on the roof of this

General Store Building that artificially discharged it down on the sidewalk below, causing it to form into ice and creating a dangerous situation. The ice didn't come there naturally; it didn't fall, from the heavens, in the form of snow or sleet or rain; it came off the roof, and if the roof hadn't been there the ice wouldn't have been there on the sidewalk, and I think under the McGoldrick-Sanderson case and the principles stated there, we have a case where there has been an artificial discharge and accumulation of water that forms into ice upon the public thoroughfare or public sidewalk, and I think that since the government was maintaining the building, and it was its duty to maintain it, that this situation could have been avoided by the exercise of reasonable diligence.

The fact that it might have been difficult or that it might be questionable as to what the best method employed would be, I don't think is material here. Perhaps it wasn't feasible under the circumstances to run a heating cable with low heat generation, not sufficient to cause fire, as I understand it, or to transmit electric shocks of any seriousness. Whether that was feasible or not, [330] certainly it isn't necessary to maintain a building in such a way that the water falls on the sidewalk, because you can build a roof over the sidewalk if necessary; that situation can be avoided and usually is avoided in the building and maintenance of buildings which project over sidewalks.

I'm not impressed by the argument that the

beauty parlor operator may have had the duty to maintain that roof. There isn't anything in evidence to justify that. The evidence affirmatively shows that the beauty parlor operator leased only a portion of the mezzanine floor. Of course, the roof covers not only the mezzanine, but the entire building, the ground floor and the mezzanine, and this beauty parlor operator had only a small portion of the mezzanine, and even the stairway that extended to her place also served a larger area occupied by a government agency and led to the hall used commercially by the government in letting it out from time to time.

Now, I think that under the circumstances here, since there was this condition that caused the ice to form in the gutter, overflow the gutter and fall down on the sidewalk, that since it was an artificial accumulation and discharge, that the government had the duty of counteracting the dangerous situation, and I'm not going to be too specific as to how I think that could have been done. [331] As I say, I think if no other method was available the eaves could have been extended over the sidewalk, or sand could have been thrown on the ice during the times it formed there, to make it safer for pedestrian travel.

Now, in the matter of this being an unusual winter, I think perhaps the testimony does justify the assumption here that this was a colder, more severe winter than usually occurs at this particular place, probably colder and more severe than all but one or two of the winters there in the last ten years, but

the difficulty is that according to the defendant's own witness here, Mr. Benjamin, this condition wasn't caused by extremely cold weather; this condition was caused by snow falling on the roof, and then melting, particularly during the middle of the day when the temperature was slightly above freezing, and then the temperature would go a little below freezing, down, as I think he said, about 20 degrees, perhaps, then it would freeze and accumulate in the gutter and cause the melting from the roof to overflow. It was a building without insulation, I think the testimony shows, and the heat escaping from inside would melt this snow on the roof, and this condition did exist, according to the testimony here, and the evidence, it existed with the knowledge of the government people up there in prior years. It had existed for an appreciable time before Mrs. Phillips fell [332] on the ice; at least for several days, there is testimony here.

There isn't any indication that this was a sudden catastrophe that descended on the Grand Coulee area. It was perhaps a little colder than it had been, but it was the same sort of thing that had been happening in prior winters, and happened before this particular January 28 in the same winter, and as I say, I can't see from the testimony where the problem would have been any different if the temperature was zero or ten below zero than if it was twenty above, because the accumulation would be precisely the same and the problem the same, perhaps even greater where the temperature was milder during the day.

Now, as to the question of contributory negligence, it's true that Mrs. Phillips knew and should have known, and I think the testimony shows did know of the dangerous condition of the sidewalk, but it was the only way afforded for her to go up to the beauty parlor in the exercise of her affairs. She had a right to patronize this place; it was open to the public, it was open inferentially, there was no barrier to show it should not be used, there wasn't anything to indicate there was any great likelihood or at least the certainty of injury if she used it, and I think she was justified in using it, but in the exercise of proper caution and care. I tried to pay particular [333] attention to her testimony, and it I think is the only direct evidence we have as to the manner in which she fell and what happened at the time she put her foot down there coming out of the entry-way and slipped and fell on the sidewalk, and there isn't any evidence as I recall that she stumbled on any ridge of ice or that she stepped on any broken icicles or that her fall was caused by any particular thing that she could have avoided if she had seen or looked at it and put her foot six inches one way or the other. What she did, she put her foot on that icy surface, that caused her to fall, and the only way I could see that she could have exercised reasonable care is to get down on her hands and knees and crawl across, and there isn't any such requirement in the use of a public thoroughfare, so I don't think there's any contributory negligence here.

Now, in the matter of the allowance for her in-

jury, I always have great sympathy for juries when I come to this particular point in a lawsuit, because it is a very, very difficult thing to say how much somebody shall have for a serious and substantial injury. It must of necessity be somewhat arbitrary in the sense that there isn't any definite yardstick you can follow, and that difficulty is even greater here where the plaintiff, or the principal plaintiff, the injured person, is a housewife and there [334] isn't shown lack of earnings or earning capacity which forms more or less of a definite yardstick.

Of course, she's entitled to substantial recovery, but the evidence here, while it indicates a permanent partial disability, indicates that her disability is from, as has been stated here, 5 to 10 per cent. I think her doctor said 5 to 10 per cent, and the doctor who testified for the defendant, 5 per cent. However, she has had considerable pain, she has a disability without any question, a permanent disability that very materially interferes with her activities, housekeeping and other activities as she testified.

Now, I might say this, that in the matter of pain and suffering, there again we have a situation where it's extremely difficult. No one would want to go through an experience for money where they have an injury of this type, and yet whether the defendant is the government or a corporation or a private individual, the court must as best it can fix the compensation or fix the award on a compensatory basis. It's not supposed to be what the person would go through the experience for, but what is fair as

a compensation, as nearly as we can arrive at it as between the plaintiff and the defendant.

I think taking into consideration the medical testimony and the other testimony of the plaintiff, and all the [335] facts and circumstances in the case, that the plaintiff should have \$3,000 for her permanent injury, and I'll allow an additional \$1200.00 for her pain and suffering, and \$1200.00 for her husband for the damage that has resulted to him by reason of his wife's past and future disability, and the special damages as they're shown here by the evidence, doctor bill and hospital bill and so on.

Now, in the matter of an allowance of attorney fee, I think 20 per cent should be allowed, because that is the maximum provided by the statute, but here the attorneys for the plaintiff have gone all the way through preparation and pretrial and trial, so that they have gone the whole course here, and I can't conceive of any situation where attorneys would be called upon to do more or would be entitled to a larger percentage than they are, so I will allow that from the award, that is, a 20 per cent attorney fee.

(Whereupon, this cause was [336] adjourned.)

Reporter's Certificate

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the duly appointed, qualified and acting official

court reporter of the United States District Court for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, United States District Judge, held at Spokane, Washington, on April 11, 12 and 13, 1951.

That the within and foregoing transcript, consisting of typewritten pages numbered 1 through 337, including this page, is a true, accurate and complete transcript of the proceedings had therein, excepting only the final arguments of counsel.

Dated this 21st day of September, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed September 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original.

Complaint.

Summons.

Motion to Dismiss and Affidavit of Mailing.

Motion to Quash.

Notice of Association of Counsel.

Notice of Appearance of William V. Kelley.

Order denying defendant's Motion to Dismiss.

Motion for Physical Examination.

Objections to Motion for Physical Examination.

Order denying Objections to Motion for Physical Examination.

Answer.

Motion for a more definite statement.

Stipulation continuing hearing on motion.

Order requiring more definite statement.

Amended Answer and Affidavit of Mailing.

Stipulation in re cross-interrogatories.

Notice of taking deposition on written interrogatories.

Motion to strike from second affirmative defense.

Order for pre-trial conference under Rule 16.

Notice of Examination of Documents and Deposition upon oral examination.

Deposition subpoena to testify—Phil Nalder.

Deposition subpoena to testify—C. E. Benjamin.

Deposition subpoena to testify—Alfred Darland.

Deposition subpoena to testify—Torloff Torkelson.

Notice of filing documents and depositions on oral examination.

Depositions of Thoralf Torkelson, Chester E. Benjamin and Philip R. Nalder. (Published at pre-trial conference, but not read into the evidence at trial of the case.)

Reply.

Notice of filing deposition of Dr. Eugene D. Wiley.

Letter dated April 3, 1951, Lionel E. Wolff to
Aram A. LaFramboise, Clerk.

Order on pre-trial conference.

Subpoena, Dr. Willis E. Smich, Bessie Dumas,
Sgt. James W. Gee.

Subpoena, Sgt. James W. Gee.

Transcript of Proceedings at Trial (not attached
but enclosed herewith).

Exhibits (not attached but enclosed herewith).

Plaintiff's 1—Bill for Drugs.

Plaintiff's 2—Hospital Bills.

Plaintiff's 3—Doctors' Bills.

Plaintiff's 4—Bill for physiotherapist.

Plaintiff's 5—Anesthesiologist's Bill.

Plaintiff's 6—Clothing Bills.

Plaintiff's 7—Draft of floor plan of building.

Plaintiff's 8, 8-a to 8-h—Photos of building
and sidewalk and street.

Plaintiff's 9—Letter, Nalder to Wolff,
11/23/49.

Plaintiff's 10—(Rejected.)

Plaintiff's 11—Telephone bills (tool charges).

Plaintiff's 12—Photo of north side of build-
ing.

Plaintiff's 12—Photo of building and area.

Defendant's 14—Weather report—1936 to
1949.

Plaintiff's 15—Lease, USA and Dumas,
6/23/47.

Plaintiff's 16—(Not offered.)

Plaintiff's 17—Daily Labor Reports, 1/3/49
to 1/28/49.

Plaintiff's 18, 18a—Galoshes worn by Mrs. Phillips at time of accident.

Plaintiff's 19, 19a—Shoes worn by Mrs. Phillips at time of accident.

Plaintiff's 20—X-ray of ankle, 1/28/49.

Plaintiff's 21—X-ray of ankle, 1/28/49.

Plaintiff's 22—X-ray of ankle, 1/29/49.

Plaintiff's 23—X-ray of ankle, 1/29/49.

Plaintiff's 24—X-ray of ankle, 2/25/49.

Plaintiff's 25—X-ray of ankle, 2/25/49.

Plaintiff's 26—X-ray of ankle, 3/18/49.

Plaintiff's 27—X-ray of ankle, 4/8/49.

Defendant's 28—X-ray, right ankle, Mrs. Phillips, 4/11/51.

Defendant's 29—X-ray, left ankle, Mrs. Phillips, 4/11/51.

Defendant's 30—X-ray, right ankle, Mrs. Phillips, 4/11/51.

Defendant's 31—X-ray, left ankle, Mrs. Phillips, 4/11/51.

Defendant's 32—(Withdrawn.)

Defendant's 33—Sketch by Benjamin.

Defendant's Proposed Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment.

Memorandum of Costs and Disbursements.

Notice of Appeal.

Order extending time to file and docket Record on Appeal.

Designation of Contents of Record on Appeal.

Plaintiff's Designation of Additional Contents of Record on Appeal.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the Appellant in his Designation of Record, and by the Appellee in his Designation of Additional Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 27th day of September, A.D. 1951.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: No. 13117. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Homer C. Phillips and Thera Phillips, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed October 1, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13117

UNITED STATES OF AMERICA,

Appellant,

vs.

HOMER C. PHILLIPS and THERA PHILLIPS,
Husband and Wife,

Appellees.

STATEMENT OF POINTS RELIED
UPON BY APPELLANT

Comes now the appellant and, pursuant to the provisions of Rule 19(6) of the Rules of the Court of Appeals for the Ninth Circuit, files the following concise statements and points upon which it intends to rely on appeal:

1. The court erred in Finding of Fact No. 4, especially in that part of the finding in which the court found that negligence was proved against the United States and its servants, agents and employees in the maintenance of the building and premises.

2. The court erred in not holding that the plaintiff was guilty of contributory negligence.

3. The court erred in not holding that accumulation of snow and ice was the result of unprecedented weather conditions and was not caused by any act or employee of the Government. The court should

have held that the accumulation of snow and ice resulted from an act of God and not as a result of any servant, agent, or employee of the United States.

4. The court erred in entering judgment against the United States in any sum.

5. The court erred in the admission of certain testimony and exhibits properly objected to.

Dated this 10th day of October, 1951.

/s/ HARVEY ERICKSON,
United States Attorney;

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Comes now the appellant and designates the following portions of the record to be printed in conformity with Rule 19 of this Court:

Complaint.

Amended Answer.

Order for Pre-Trial Conference.

Notice of Examination of Documents and of
Deposition Upon Oral Examination.

Reply.

Order on Pre-Trial Conference.

Findings of Fact and Conclusions of Law.

Judgment.

Reporter's Transcript of All Testimony.

All Exhibits.

Notice of Appeal.

Order Extending Time to File and Docket Record
on Appeal.

Appellant's Designation of Portions of Record to
Be Printed in Conformity with Rule 19.

Dated this 25th day of September, 1951.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant United States Attorney, Attorneys for
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 27, 1951.

